

No. 2728

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a
Corporation, Owner and Claimant of Steamship "Vir-
ginian,"

vs.

Appellant.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration,

Appellee.

AMERICAN-HAWAIIAN STEAMSHIP COMPANY, a
Corporation, Owner and Claimant of Steamship "Vir-
ginian,"

vs.

Appellant.

STRATHALBYN STEAMSHIP COMPANY, LTD., a Cor-
poration, as bailee of a cargo of lumber consisting of
3,563,011 feet, and for the use and benefit of the owners
and insurers of said cargo,

Appellee.

UPON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE WESTERN
DISTRICT OF WASHINGTON,
SOUTHERN DIVISION.

BRIEF OF APPELLANT

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STATEMENT

This is an appeal from a decree in Admiralty of
the United States District Court for the Western Dis-
trict of Washington, Southern Division. The original

libel was filed by the Strathalbyn Steamship Company, owner of the steamship "Strathalbyn," against the steamship "Virginian." The American-Hawaiian Steamship Company, as owner of the steamship "Virginian," appeared in this proceeding, filed its claim, and also filed an answer and cross-libel against the steamship "Strathalbyn." The Strathalbyn Steamship Company, Ltd., appeared as claimant of the steamship "Strathalbyn," and filed an answer to the cross-libel of the "Virginian." Subsequently, the Strathalbyn Steamship Company, Ltd., as bailee of the cargo aboard the steamship "Strathalbyn" at the time of the collision, filed a libel against the steamship "Virginian" on account of damage sustained by said cargo. The American-Hawaiian Steamship Company appeared in this proceeding, as claimant of the steamship "Virginian," and first moved the court for a dismissal of this second libel, on the ground that the same was an amplification of the relief sought in the first libel filed by the Strathalbyn Steamship Company, and that the sum demanded in the first libel was sufficient to cover the damages both to the "Strathalbyn" and to her cargo. Upon denial of this motion, the court ordered the two causes consolidated and the American-Hawaiian Steamship Company filed its answer in the second proceeding, and also filed its petition, under the 59th Admiralty rule of the Supreme Court, against the steamship "Strathalbyn," upon which petition the steamship "Strathalbyn"

was brought into this second proceeding as respondent. The Strathalbyn Steamship Company, Ltd., appeared therein as claimant of said steamship "Strathalbyn" and filed its answer to the libel therein. The first proceeding brought by the Strathalbyn Steamship Company was numbered 1036 of the records and files of the lower court; the second proceeding brought by the Strathalbyn Steamship Company, as bailee, was numbered 1052 of the records and files of the lower court. After the order of consolidation, the proceedings were referred to a commissioner for the purpose of taking testimony and testimony thereafter was taken in the consolidated causes.

The collision from which these causes arise occurred on the night of January 12, 1912, between the hours of 7:30 and 8:00 o'clock p. m., at a point south of Pully Point, on the waters of Puget Sound, approximately half way between the ports of Seattle and Tacoma, Washington. The "Virginian" is a large freight steamer, 492 feet long, 58 feet 3 inches beam, 31 feet 9 inches depth, with a maximum carrying capacity of 12,000 tons, and at the time of the collision was engaged in a regular trade between the ports of San Francisco, Seattle, Honolulu and Salina Cruz, connecting at Salina Cruz with the Tehauntepec Railway, and was owned by the American-Hawaiian Steamship Company, being one of their regular Pacific coast fleet. The "Strathalbyn" was a British tramp steamer, 387

feet long, 52 feet beam, with a dead weight carrying capacity of 7,200 tons, owned by the Strathalbyn Steamship Company, Ltd., a British corporation with its head office at Glasgow, Scotland, and at the time of the collision was under charter to the American Trading Company for a voyage from Tacoma, Washington, to Australia. The "Virginian," at the time of the collision, was on her regular voyage from Seattle to Tacoma with approximately 2,000 tons of cargo, being light and standing high out of the water. The "Strathalbyn" at the time was on her voyage from Tacoma to Australia, with a full cargo of lumber below decks and with a heavy deck load of lumber both on her forward and after decks, and had a 6° list to starboard.

In the libel filed by the Strathalbyn Steamship Company, in Cause 1036 of the lower court, it was alleged that the "Strathalbyn" left the port of Tacoma about 6:15 p. m., on January 12, 1912, bound on her voyage for Sydney, Australia; that at said time she was fully equipped, manned and supplied, that her range and side lights were properly set and brightly burning and that she was in charge of a competent pilot, master and crew, with a lookout on her forecastle head; that she proceeded on her voyage until the light of Robinson Point was abeam, when her course was changed to northwest, one-half north, magnetic; that at the time of rounding Robinson Point the light on

Pully Point was visible ahead, as well as the lights of two vessels which appeared to be north of Pully Point and approaching the "Strathalbyn;" that when the "Strathalbyn" was about one-half way between Robinson and Pully Points, she blew one blast of her whistle and received an answering blast from the steamship "Flyer," being one of the vessels which she had previously seen ahead of her, and passed the said "Flyer" port to port; that as soon as the "Flyer" had passed the "Strathalbyn," the "Strathalbyn" blew one blast of her whistle to the "Virginian," as a signal to pass her on the port side; that at the time of blowing this blast, both the red and green side lights of the "Virginian" were visible; that the "Virginian" did not answer this first passing signal and that after proceeding for approximately another minute, the "Strathalbyn" blew another blast of her whistle, as a signal to the "Virginian," which blast was not answered by the "Virginian." That at this time the red light of the "Virginian" had closed and after giving this second passing whistle to the "Virginian," and after having waited and received no reply from the "Virginian," and after having ported her helm, the engines of the "Strathalbyn" were stopped, and about a minute thereafter the "Strathalbyn" again sounded one blast of her whistle, as a signal for the "Virginian" to pass her port to port, which blast was not answered by the "Virginian," and that at this time the red light

was entirely shut out and the green light being alone visible, the "Strathalbyn" backed full speed astern and sounded the danger signal. That the "Virginian" answered this with three blasts of her whistle. That shortly thereafter the "Virginian" struck the "Strathalbyn" on the port bow in the vicinity of the hawse pipe.

It was further alleged that the collision occurred without any fault on the part of the "Strathalbyn," and was solely through the fault, carelessness and neglect of the "Virginian," as aforesaid, and in failing to keep away from the "Strathalbyn." (Apostles, pp. 5 to 8.)

The answer of the American-Hawaiian Steamship Company to this libel denied that the "Strathalbyn" was equipped with proper range and side lights, and denied that the same were properly set and burning. It admitted that the "Virginian" heard a blast at some point ahead of her, which was answered by the "Flyer," at a time when the "Flyer" was about a quarter of a mile ahead of and off the starboard bow of the "Virginian;" admitted that thereafter the "Virginian" heard the blast of a whistle from some point ahead, and admitted that thereafter she heard another blast from a point ahead, which blast was not answered by the "Virginian," for the reason that neither the lights of the vessel nor the vessel itself, from which the blasts proceeded, were visible to the pilot, officers or lookout on the "Virginian." It further admitted that the "Vir-

ginian" heard the danger signal immediately prior to the collision, and admitted that she answered this with three blasts of her whistle. (Apostles, pp. 9 to 11.)

By way of cross-libel, the American-Hawaiian Steamship Company alleged that the "Virginian" left the port of Seattle at about 6:40 p. m. on the evening of January 12, having aboard about 2,000 tons of cargo, and proceeded on her way to the port of Tacoma, and that the said steamship was at said time fully equipped and manned, and supplied with good and sufficient range and side lights, properly set and brightly burning, with a lookout stationed on her forecastle head and that it was in charge of a competent pilot, officers, master and crew, and that after rounding Alki Point, she proceeded on a course southeast by south, magnetic, until she approached Pully Point, when she hauled to the westward for the purpose of keeping well off said point, and that she was abeam of said point at 7:53 p. m., ship's time, and approximately half a mile distant therefrom; that when abeam of said point she straightened out her course for Point Robinson to southeast, one-quarter south, magnetic, and that she proceeded on this course until the happening of the collision with the steamship "Strathalbyn." That when she was abreast of Pully Point she was overtaken and passed by the steamer "Flyer," which said steamer hauled off to the right, passing on the starboard side of the "Virginian," with a clearance of about 100

yards; that said "Flyer," having given one blast of her whistle to the "Virginian," which the said "Virginian" answered with a blast of her whistle, proceeded on her way; that when the steamship "Flyer" was about an eighth of a mile ahead and well off the starboard bow of the "Virginian," the pilot and third officer of the "Virginian" heard one blast of a whistle given from some vessel ahead whose lights were not visible; that this blast was answered by the steamship "Flyer;" that about one minute thereafter they again heard one blast of the whistle from some point ahead, but being unable to see any ship's lights or to distinguish the vessel from which the blasts proceeded the pilot immediately ordered the engines of the "Virginian" stopped, and with the aid of his marine glasses attempted to discover from what vessel the blasts had proceeded; that neither the pilot nor third officer were able to see the lights of any ship ahead, and receiving no call or information from their lookout, the pilot immediately ordered the engines reversed full speed astern, at which time another blast was heard at some point ahead; that a short time thereafter, the pilot and other officers of the "Virginian" being still unable to discover the lights of any vessel from which the said blasts had proceeded, or to discover or locate the position of said vessel, four blasts were heard from a point ahead and were immediately answered by three blasts of the whistle of the "Virginian," signifying that her

engines at the time were going full speed astern, and a few seconds later the said steamship "Strathalbyn" loomed out of the darkness immediately in front of the "Virginian," and the two vessels forthwith came into collision, head on, or nearly so, said steamship "Virginian" being struck on her starboard side just abaft her stem, listing her to port. That at the time of the collision the engines of the "Virginian" had been reversing full speed astern two minutes or more and that immediately after the collision she backed away from the steamship "Strathalbyn." That the night was dark at the time of said collision and that for some little time prior thereto the sky was overcast and rain fell shortly thereafter.

It is further alleged that the said collision occurred without any fault on the part of the steamship "Virginian" or her officers or crew, but solely because the steamship "Strathalbyn" did not at said time have starboard and port lights or any mast head or range lights properly placed and lighted, as required by law, so as to render said ship visible to an approaching vessel in the night time, and because the said steamship "Strathalbyn," receiving no answer to the signal blast of her whistle, was advised that she could not be located by the steamship "Virginian," and negligently proceeded on her course. (Apostles, pp. 11 to 15.)

The Strathalbyn Steamship Company, in its answer to this cross-libel, admitted that the "Virginian's"

range lights and side lights were properly set and burning, admitted that the "Flyer" passed the "Virginian" in the vicinity of Pully Point on the starboard side of the "Virginian" and that the "Flyer" blew one blast of her whistle to the "Virginian" at the time of passing, which was answered by the "Virginian," and affirmatively alleged that after the "Strathalbyn" had passed the "Flyer," and while she and the "Virginian" were approaching, and when the red and green lights of the "Virginian" were visible, and her range lights were both in line, the "Strathalbyn" blew one passing blast to the "Virginian," signifying that it was her intention to pass port to port, but that instead of the "Virginian" responding to said signal, the "Virginian" swung to port and closed her red light and continued to approach with little, if any, abatement in her speed. That in this position the "Strathalbyn" then blew another passing signal to the "Virginian," signifying her intention to pass port to port.

It is further alleged that the "Strathalbyn" ported her helm between the first and second blasts of the "Strathalbyn," but that instead of the "Virginian" porting her helm, the "Virginian" continued to swing to port; that thereupon the "Strathalbyn" again blew a passing signal to pass the "Virginian" port to port, but that the "Virginian" neglected to respond to said signal and the "Virginian" continued to swing to port, and it then becoming evident that the "Virginian" was failing

and neglecting to conform to the rules of the road, the "Strathalbyn," after again porting her helm, blew the danger signal.

It is further alleged that at about the time of giving the danger signal to the "Virginian," the "Strathalbyn" reversed her engines full speed astern, and so remained reversed for about a minute, and at the time of the collision the "Strathalbyn" was practically stationary.

It is further alleged that the "Strathalbyn" was showing her red light to the "Virginian" at the time of blowing her passing signal, and continued to show her red light up to the time of the collision, but that the "Virginian" neglected to heed said light or the passing signals and neglected to stop and reverse in time to avoid the collision. (Apostles, pp. 15 to 18.)

The pleadings in Cause No. 1052 in the lower court are practically the same as the pleadings in Cause No. 1036, as we have set them out above.

After a lengthy hearing before the Commissioner, these consolidated causes were argued and submitted to the court upon the testimony taken and returned by the Commissioner, and numerous depositions taken in said consolidated causes by stipulation of the parties, and the court, on the 10th day of October, 1914, filed its memorandum decision in said consolidated causes, wherein it found both vessels at fault. In this memo-

random decision the court first considered "*the faults alleged as to the lights of the 'Strathalbyn' * * * as first in point of time and so affecting that which followed,*" (1416) and held, after exhaustive consideration and review of all the testimony, "*that the side lights of the 'Strathalbyn' were hidden to the 'Virginian' as she approached, and that this was a proximate cause of the collision.*" Having reached this conclusion as to the primary and initial fault of the "Strathalbyn," the court did not consider the other faults alleged against her.

The court also found "that the engines of the 'Virginian' were not reversed until less than a minute before the collision, and that she was clearly in fault for not reversing her engines sooner." (1430); and further found that the "Virginian" was in fault for failure to give the danger signal. The court did not expressly find that either of these faults of the "Virginian" were a contributing cause to the collision. However, the damages were ordered divided and the causes again referred to the Commissioner for the purpose of ascertaining the damages. Subsequent to this decision, however, the parties stipulated as to all the damages, and on November 26, 1915, a final decree was entered by the court, allowing all parties interest on damages from the date of disbursements, and their taxable costs. The court, following the stipulation of the parties, fixed the damages in this decree as follows:

Damages to the "Strathalbyn," including demurrage and interest, \$121,793.97, taxable costs of "Strathalbyn," \$6,248.92, making a total of \$128,042.89; damages to the "Virginian," including demurrage and interest, \$69,519.97, taxable costs of "Virginian," \$5,153.00, making a total of \$74,672.97; damages to cargo, including interest, \$8,201.77, taxable costs of cargo owner, \$52.08, making a total of \$8,253.85. The court entered a decree, allowing the "Strathalbyn" one-half of its excess of damages and taxable costs, taxed as above at \$128,042.89, over and above the damages and taxable costs of the "Virginian," taxed as above at \$74,672.97, or the sum of \$26,684.96, to which was added the sum of \$744.07, being allowance for one-half of the amount paid by the "Strathalbyn" in settlement of personal injuries to and loss of effects by seamen aboard the "Strathalbyn," in accordance with the stipulation of the parties, making a total allowance to the "Strathalbyn" of \$27,429.03 against the American-Hawaiian Steamship Company, claimant of the steamship "Virginian," and the American Surety Company, surety on its stipulation for the release of the steamship "Virginian," and ordered that execution issue therefor. The court further allowed the cargo owner the full amount of its damages, interest and costs, amounting to \$8,253.85, against the American-Hawaiian Steamship Company, as claimant of the steamship "Virginian" and the American Surety Company, surety on its stipulation for the release of said vessel. It further

provided that execution issue therefor. The court then provided that execution in favor of the Strathalbyn Steamship Company, Ltd., as libelant in the original proceeding, "now only issue for the amount decreed it, to-wit, the sum of \$27,429.03, less one-half the amount deducted in favor of the Strathalbyn Steamship Company, Ltd., a corporation, as bailee, that is, less the sum of \$4,126.92, and that execution on such deducted amount by stayed until the time for an appeal herein has expired; that in case such an appeal is not taken by claimant and cross-libelant, execution then to issue for the remainder;" and further provided that in case of an appeal, execution be stayed until the filing of the mandate, then to issue unless the claimant and cross-libelant prevailed on the appeal; that upon payment by said claimant and cross-libelant to the bailee of the cargo of such deducted amount of \$4,126.92, execution shall be perpetually stayed or judgment satisfied. (Apostles, pp. 1435 to 1439.)

From this judgment the appellant prosecutes this appeal and makes the following

ASSIGNMENT OF ERRORS

1. That the Court erred in finding and decreeing that the collision mentioned in the pleadings herein between the S. S. "Virginian," and the S. S. "Strathalbyn," resulted from or was caused by the mutual fault of said S. S. "Virginian" and said S. S. "Strathalbyn," and in refusing to find and decree that said collision resulted from the sole fault and negligence of the said S. S. "Strathalbyn."

2. That the Court erred in finding and decreeing that in said causes the damages resulting from the collision mentioned in the pleadings should be divided.

3. That the Court erred in refusing to allow, award and decree to claimant and cross-libelant in Cause No. 1036 the full amount of damages sustained by it as the result of the collision between the said S. S. "Virginian" and the said S. S. "Strathalbyn," together with interest thereon, and its costs in said suit, as prayed for in its said cross-libel.

4. That the Court erred in finding that the engines of the "Virginian" were not reversed until less than a minute before the collision.

5. That the Court erred in finding that the "Virginian" was in fault for not reversing her engines sooner.

6. That the Court erred in holding that the failure of the "Virginian" to reverse her engines sooner

in any way caused or contributed to the collision between the "Virginian" and the "Strathalbyn."

7. The Court erred in finding that the "Virginian" should have blown a danger signal.

8. The Court erred in holding that the failure of the "Virginian" to give a danger signal caused or in any way contributed to the collision between the "Virginian" and the "Strathalbyn."

9. The Court erred in refusing to hold that the burden of proof was upon the "Strathalbyn" to show that her fault was not the sole cause of said collision.

10. The Court erred in allowing the Strathalbyn Steamship Company, Ltd., libelant in Cause No. 1036, interest on its damages and costs in said suit.

11. The Court erred in allowing the Strathalbyn Steamship Company, Ltd., as bailee of cargo, libelant in Cause No. 1052, interest on its damages and costs in said suit.

12. The Court erred in refusing to dismiss Cause No. 1052.

13. The Court erred in allowing and decreeing that the Strathalbyn Steamship Company, Ltd., as bailee of cargo, libelant in Cause No. 1052, recover from American-Hawaiian Steamship Company, claimant, the full amount of its damages, or any portion thereof.

14. The Court erred in allowing the Strathalbyn Steamship Company, Ltd., libelant in Cause No. 1036, one-half of the difference between its excess damages over the damages sustained by claimant and cross-libelant, and refusing to deduct therefrom one-half of the amount decreed to the Strathalbyn Steamship Company, Ltd., as bailee of cargo, against the American-Hawaiian Steamship Company, claimant, in Cause No. 1052.

15. The Court erred in decreeing and allowing immediate execution against American-Hawaiian Steamship Company and its surety for the amount decreed in favor of libelant in Cause No. 1036, to-wit, the sum of Twenty-seven Thousand Four Hundred Twenty-nine and 03/100 Dollars (\$27,429.03), less one-half the amount decreed in favor of libelant in Cause No. 1052, against the American-Hawaiian Steamship Company, to-wit, \$4,126.92.

16. The Court erred in holding that execution on said deducted amount of \$4,126.92 should be stayed until time of appeal had expired, and that in case such appeal was not taken by said claimant and cross-libelant, execution should then issue for the remainder.

CONTENTIONS OF APPELLANT

The above assignment of errors is naturally an attack upon that portion of the decision of the lower court holding the "Virginian" guilty of any fault, and is also an attack upon the form of the decree of the lower court. It will be the contention of the appellant that the finding of the court that the steamship "Strathalbyn," at the time of the collision and prior thereto, was equipped with insufficient lights, contrary to law and the Collision Regulations, and the further finding that these lights were so positioned that they were obscured by the cargo stanchions aboard the "Strathalbyn" so that they could not be seen ahead, and were and could not be seen by the "Virginian" or any of her officers or crew as the vessels were approaching each other prior to said collision, are findings of initial gross fault on the part of the "Strathalbyn," which of itself was sufficient to account for this collision, and that it is not sufficient for the "Strathalbyn" to raise a question or doubt as to the navigation or fault of the "Virginian," but that the burden is upon the "Strathalbyn" to conclusively show that the "Virginian" was also guilty of gross fault which was a direct contributing cause to said collision. It will also be the contention of the appellant that the "Strathalbyn" was guilty of other gross faults which were not considered by the court below and that these faults, together with the gross initial fault of insufficiency and obstruction of

her lights, being sufficient to account for the collision, even if the "Virginian" was guilty of faults attributed to it by the lower court, they were mere errors of judgment by the master and officers in charge of the "Virginian" at a time of extreme danger, which danger was brought about by the gross carelessness and negligence of the "Strathalbyn," and that such faults, if any, were not in any way a proximate cause of the collision and did not contribute to the same, and were not of such character as to hold the "Virginian" for an equal amount of the damages.

We shall first consider briefly the faults against the "Strathalbyn" found by the lower court and we shall then consider the other faults alleged against the "Strathalbyn" which were not considered by the lower court. We shall next consider the alleged faults found against the steamship "Virginian," and in conclusion will consider the form of decree entered by the lower court.

ARGUMENT

I.

The Faults of the "Strathalbyn" were the proximate, primary and causative faults sufficient to account for the Collision and the burden is on the "Strathalbyn" to show that they were not the sole causes thereof.

(ASSIGNMENT OF ERRORS, 1, 3, 9.)

(A) POSITION OF VESSELS WITH REFERENCE TO EACH OTHER AT TIME PASSING WHISTLES WERE GIVEN.

In order to arrive at a clear understanding of the navigation of the "Virginian" and "Strathalbyn" and their respective duties prior to the collision, it is necessary to determine the location of the vessels with reference to each other at the time the various passing signals were given by the "Strathalbyn." The testimony shows that the "Flyer" passed the "Virginian" off of or slightly north of Pully Point. That after passing some distance ahead of the "Virginian," the "Flyer" exchanged passing signals with the "Strathalbyn" (the first whistle being blown by the "Strathalbyn"), that as the "Flyer" and "Strathalbyn" were passing abeam the "Strathalbyn" blew her first whistle to the "Virginian." The above facts are admitted, but it is difficult to accurately determine, from the conflicting testimony, the exact location of these vessels with reference to each other at the time these passing signals were given.

The "Virginian" passed Pully Point at 7:53 by her chart room time. (Apostles, pp. 833, 889, 1157.) The collision took place between 7:59 and 8:00 by the same time. (Apostles, pp. 900, 903, 1166.) This time is definitely determined. By the "Strathalbyn's" engine room time the collision took place at 7:38 (Apostles, p. 371), so that there was about 21 minutes difference between the "Strathalbyn's" engine room time and the "Virginian's" chart room time. Captain Burns of the "Flyer" testified that the "Strathalbyn" was from $\frac{1}{4}$ to $\frac{1}{2}$ mile ahead of the "Flyer" when she whistled to the "Flyer" (Apostles, pp. 174-5), and that the "Virginian" was about $\frac{1}{8}$ of a mile astern of the "Flyer" at this time. (Apostles, p. 176.) Captain Beecher, pilot of the "Strathalbyn," testified that the "Flyer" was from $\frac{1}{4}$ to $\frac{1}{2}$ a mile ahead of the "Strathalbyn" when he signaled her. (Apostles, p. 205, p. 222.) That he gave the "Virginian" the first passing signal when the "Flyer" was abeam of the "Strathalbyn" (Apostles, p. 222). Beecher further testified that one minute elapsed between his first and second whistles (Apostles, p. 223), that another minute elapsed between his second and third whistles (Apostles, p. 227), that he gave the danger signal and reversed immediately after giving the third whistle (Apostles, pp. 227, 284), and that the collision occurred about a minute later (Apostles, p. 228). That the point of collision was about one mile south of Pully Point (Apostles, p. 222).

Capt. Crerar, master of the "Strathalbyn," came on deck between the first and second whistles to the "Virginian." He estimated that the "Virginian" was about a mile away at that time (Apostles, p. 241), that the "Flyer" was from a quarter to half a mile astern (Apostles, p. 241), that the "Strathalbyn" whistled to the "Virginian" about two minutes after she had whistled to the "Flyer" (Apostles, p. 257). Purdy, first officer of the "Strathalbyn," estimated that the "Virginian" was about one and one-half miles away at the time "Strathalbyn" gave her the first passing whistle (Apostles, p. 294). Russell, quartermaster of the "Strathalbyn's" wheel, testified that the "Strathalbyn" whistled to the "Virginian" one to one and one-half miles after she had whistled to the "Flyer" (Apostles, p. 328). He states that about one minute elapsed between the first and second passing signals, and about two minutes elapsed between the second passing whistle and the collision (Apostles, pp. 329-30).

Capt. Green, master of the "Virginian," testified that he came on the bridge immediately after the "Strathalbyn's" first whistle to the "Virginian," that the "Flyer" was about 1,000 feet ahead of the "Virginian" at this time (Apostles, p. 839). Capt. Green went below as the "Flyer" passed the "Virginian" off Pully Point at 7:53, and had been below about three minutes when he heard the "Virginian" telegraph from the bridge to the engine room to stop the engines (Apostles, p. 835).

McLeod, third officer of the "Virginian," testified that about two minutes after the "Flyer" had passed the "Virginian," he heard one whistle from ahead which was answered by the "Flyer" (Apostles, p. 891). That about one minute passed between the "Strathalbyn's" first and second whistles (Apostles, p. 897), and about two minutes elapsed between this second whistle and the collision (Apostles, p. 899). That the collision occurred about $\frac{3}{4}$ of a mile south of Pully Point (Apostles, p. 899). That he looked at his watch at time of collision and told the quartermaster at the wheel (Shuri), to note the time which was "very close to eight, it was nearer eight than it was anything else." (Apostles, p. 900.) Capt. Duffy, pilot of the "Virginian," testified that the "Flyer" passed the "Virginian" off Pully Point at 7:53 (Apostles, p. 1157); that when the "Flyer" was 300 to 400 feet ahead of the "Virginian" he heard a whistle from ahead which was answered by the "Flyer" (Apostles, p. 1158); that about one minute after the "Flyer" had answered this whistle he heard another whistle from ahead (being "Strathalbyn's" first whistle to the "Virginian") (Apostles, p. 1160). That about one minute elapsed between the "Strathalbyn's" first and second whistles, that from one and one-half to two minutes elapsed between this second whistle and the danger signal and one-half to one minute from the danger signal to the collision (Apostles, pp. 1174-5); that the collision occurred between 7:59 and 8 o'clock (Apostles, p. 1166).

The above is all the material testimony as to the position of the "Strathalbyn," "Virginian" and "Flyer" at the time of the various passing whistles. From this testimony, certain facts are fairly accurately established.

The "Flyer" overtook and passed the "Virginian" at 7:53 ("Virginian's" time), while the vessels were off Pully Point. The collision occurred between 7:59 and 8 o'clock by the "Virginian's" time, or 7:38 by the "Strathalbyn's" engine room time. From the time the "Flyer" passed the "Virginian" at 7:53 to the time of collision between 6 and 6½ minutes elapsed. From the time the "Strathalbyn" blew her passing signal to the "Flyer" until the said vessels were abeam from one to two minutes elapsed. That the "Strathalbyn" blew her first passing whistle to the "Virginian" when the "Flyer" was abeam or just abaft the beam of the "Strathalbyn." That about one minute elapsed between the "Strathalbyn's" first and second passing whistles to the "Virginian" and that from two to two and one-half minutes elapsed between the "Strathalbyn's" second whistle and the collision, and that if the "Strathalbyn" blew a third passing whistle (it was not heard aboard the "Virginian"), it was blown at practically the same time as the danger whistle, that is, about one minute or more after the second whistle, and that the danger whistle was blown about (probably less than) one minute before the collision. That from

the "Strathalbyn's" first whistle to the "Virginian" from three to three and one-half minutes elapsed before the collision.

The "Flyer" was making $14\frac{1}{2}$ knots, the "Virginian" 11 knots, and the "Strathalbyn" 6 knots or more prior to the collision (Apostles, p. 1414). The Court found that the "Flyer" was making 14 knots, but Burns' testimony shows $14\frac{1}{2}$ knots (Apostles, p. 180). From these established facts it is possible to determine approximately the position of these vessels at the time of the various passing signals. At $14\frac{1}{2}$ knots (6,080 ft.) per hour the "Flyer" would be making 1,470 feet per minute, the "Virginian" at 11 knots per hour would be making 1,116 feet per minute, and the "Strathalbyn" at 6 knots per hour would be making 608 feet per minute. The "Flyer" was making approximately 354 feet per minute better time than the "Virginian" and was forging ahead of her at that rate of speed. The "Strathalbyn" and "Flyer" were approaching each other at their combined speeds, or at the rate of 2,080 feet per minute. The collision occurred from 3 to $3\frac{1}{2}$ minutes after the "Strathalbyn" blew her first whistle to the "Virginian," when she had the "Flyer" abeam, therefore, the "Strathalbyn" was approximately the same distance ahead of the "Virginian" at this time as the "Flyer" was ahead of the "Virginian" (the "Strathalbyn" approaching and the "Flyer" leaving the "Virginian"). If the collision

occurred at 7:59, then the "Flyer" when abeam of the "Strathalbyn" (3 to $3\frac{1}{2}$ minutes prior to collision) was from $2\frac{1}{2}$ to 3 minutes past the "Virginian" (having passed her at 7:53); if the collision occurred at 7:59 $\frac{1}{2}$, the "Flyer" was from 3 to $3\frac{1}{2}$ minutes past the "Virginian," in other words the "Flyer" was from $2\frac{1}{2}$ to $3\frac{1}{2}$ minutes past the "Virginian" at the time she was abeam of the "Strathalbyn" and during this period she had been leaving the "Virginian" astern at the rate of 354 feet per minute.

It is, therefore, fairly accurately determined that at the time the "Strathalbyn" blew her first passing whistle to the "Virginian," the "Flyer," which was abeam of the "Strathalbyn," was from 885 feet to 1,239 feet ahead of the "Virginian," and that this was the approximate distance between the "Strathalbyn" and "Virginian," that is, from $\frac{1}{8}$ to $\frac{1}{4}$ of a mile. This is directly corroborated by Captain Burns ("Flyer"), testimony.

A. Oh, the 'Virginian,' I was probably a quarter of a mile or more from the 'Virginian' when we passed the 'Strathalbyn.'" (Apostles, p 174.)

Burns of the "Flyer," estimates that the "Strathalbyn" was from $\frac{1}{4}$ to $\frac{1}{2}$ mile ahead of the "Flyer" at the time she signalled the "Flyer," and that the "Virginian" was $\frac{1}{8}$ of a mile astern of the "Flyer" at this time; Beecher of the "Strathalbyn," estimates the same distance. The testimony of Beecher is that these ves-

sels were abeam about two minutes later; Duffy says about one minute later; Crerar says two minutes later. McLeod says two minutes after "Flyer" passed "Virginian" she whistled to "Strathalbyn." (Apostles, p. 890.) If it took the "Flyer" and "Strathalbyn" one minute to come abeam after exchanging whistles, they must have been 2,080 feet apart at the time of whistling (being combined speed of these vessels), and the "Flyer" would have been from 2 to $2\frac{1}{2}$ minutes ahead of the "Virginian" at this time, or from 708 to 885 feet ahead of the "Virginian," which corroborates Burns' testimony. If it took the "Flyer" and "Strathalbyn" two minutes to come abeam, they must have been 4,160 feet apart, and the "Flyer" would have been from 354 to 531 feet ahead of the "Virginian" (from 1 to $1\frac{1}{2}$ minutes ahead), which corroborates Duffy's estimate of 300 to 400 feet. Capt. Green of the "Virginian" went below as the "Flyer" passed the "Virginian" at 7:53; he was below three minutes when he heard the "Virginian" telegraph her engine room to stop her engine (being at the time the "Starthalbyn's" first whistle was given to the "Virginian"). In this time the "Flyer" would have forged ahead of the "Virginian" 1,062 feet (three minutes at 354 feet per minute). Green estimates that the "Flyer" was 1,000 feet ahead of the "Virginian" at this time, which directly corroborates our figures.

Therefore, it is accurately determined from the above testimony that the "Flyer" passed the "Vir-

ginian" at 7:53; that from one to two minutes before the "Flyer" and "Strathalbyn" were abeam they exchanged passing signals, being from 2,080 feet to 4,160 feet, or from $\frac{1}{4}$ to $\frac{1}{2}$ a mile apart; that when the "Strathalbyn" and "Flyer" were abeam at 7:55 $\frac{1}{2}$ to 7:56 $\frac{1}{2}$ (being 3 $\frac{1}{2}$ to 3 minutes before collision) the "Virginian" was astern of the "Flyer" and ahead of the "Strathalbyn" from 885 to 1,239 feet.

If the testimony of the witnesses which we have quoted above is correct, then this estimate of the distance between the "Virginian" and "Strathalbyn" at the time of the "Strathalbyn's" first whistle to the "Virginian" must be approximately correct. The testimony of witnesses at the time immediately prior to the collision, when the vessels were in a position of extreme peril, is never accurate, and the tendency of such witnesses is to exaggerate rather than minimize the length of time, as is shown by the testimony of Captain Beecher, where he states that it seemed hours between his danger signal and the collision. When it is remembered that the "Virginian" and "Strathalbyn" were approaching each other at a combined speed of approximately 1,724 feet per minute, it seems that these vessels must have been more than 1,239 feet apart at the time of the "Strathalbyn's" first whistle. If they had not been any greater distance apart they would have come together in approximately one minute after this first whistle was blown. It does not seem possible

that the "Strathalbyn" blew two and possibly three passing signals and gave a danger signal, all within a period of one minute. It is our opinion that these vessels were farther apart than 1,239 feet at the time this first whistle was given. In other words, that it must have been more than three minutes from the time the "Flyer" passed the "Virginian" to the time she was abeam of the "Strathalbyn."

The time of passing Pully Point being fixed at 7:53 and the time of the collision being fixed at from 7:59 to 8:00, or say 7:59½, the time when the "Flyer" was abeam of the "Strathalbyn" was necessarily considerably less than this period of 6½ minutes from the time she passed the "Virginian," and in our opinion was certainly over 3 minutes from the time she passed the "Virginian." The testimony shows that at the time of the collision the "Flyer" was from ½ to ¾ of a mile astern of the "Strathalbyn." As the "Flyer" was making 1,470 feet per minute, in two minutes she would travel 2,940 feet, being approximately a half mile. During this two minutes after she had passed the "Strathalbyn," the "Strathalbyn," according to her testimony, had been going full speed ahead for about one-third of the period, had been stopped about one-third of this period and had been reversing about one-third of this period, at the end of which time she was practically at a standstill. The speed which she would make during this two minutes, under the above conditions of her engines, is of course, impossible to accurately

estimate, but this speed, added to the "Flyer's" speed, would make the distance between them at the end of two minutes from one-half to three-quarters of a mile. We are therefore of the opinion that the estimate of the witnesses that from the time the "Strathalbyn" and "Flyer" were abeam to the time of the collision was from 3 to $3\frac{1}{2}$ minutes, is in excess of the actual time and that this time did not exceed two minutes. In other words, that at the time the "Strathalbyn" blew her first whistle to the "Virginian," when she was abeam of the "Flyer," the "Flyer" was from 4 to $4\frac{1}{2}$ minutes ahead of the "Virginian," or from 1,400 to 1,600 feet, and that this was the approximate distance between the "Strathalbyn" and "Virginian" at this time. The estimate of the lower court (Apostles, pp. 1414, 1415), that the "Flyer" and "Strathalbyn" exchanged whistles "not over five minutes" after the "Flyer" had passed the "Virginian" and that it was "three minutes or more" from the "Strathalbyn's" first whistle to the "Virginian" until the collision, is manifestly in excess of the actual time, as this would make a time of from 8 to $8\frac{1}{2}$ minutes plus the time which it took the "Strathalbyn" and "Flyer" to come abeam after exchanging whistles, which must have been at least two minutes, or a total period of say 10 minutes from the time the "Flyer" passed the "Virginian" to the time of the collision, which would make the time of the collision considerably after 8 o'clock. But even taking the Court's finding as correct, it still shows

that these two vessels ("Strathalbyn" and "Virginian") were less than half a mile apart at the time the "Strathalbyn" blew her first whistle. In five minutes' time the "Flyer" would forge ahead of the "Virginian" approximately 1,700 feet, or a little over a quarter of a mile. In two minutes' additional time (that is, the time elapsing from the time the "Flyer" and "Strathalbyn" exchanged passing whistles until they were abeam), the "Flyer" would forge ahead an additional distance of approximately 700 feet, so that at the time the "Strathalbyn" and "Flyer" were abeam, the "Flyer" would be approximately 2,400 feet ahead of the "Virginian," which would be the distance between the "Virginian" and "Strathalbyn," which is less than half a mile.

Now the combined speeds of the "Virginian" (1,116 ft.) and the "Strathalbyn" (608 ft.) is 1,724 feet. Taking into consideration the fact that the "Virginian" stopped at the "Strathalbyn's" first whistle and reversed prior to her second whistle, and the further fact that the "Strathalbyn" stopped at her second whistle and reversed at the time of giving the danger signal, and that both vessels were practically at a stand still at the time of collision, it becomes apparent that it could not have taken these vessels over two minutes to come together after the "Strathalbyn's" first whistle was blown.

This estimate of $\frac{1}{2}$ mile or less cannot be far wrong when it is figured that it would take the "Flyer"

approximately 20 minutes to forge one mile ahead of the "Virginian" or ten minutes to forge one-half mile ahead. The testimony conclusively shows that it was considerably less than ten minutes from the time the "Virginian" and "Flyer" passed at Pully Point at 7:53 to the time of collision. The fact that the "Strathalbyn" was less than $\frac{1}{2}$ mile (probably closer to $\frac{1}{4}$ mile) from the "Virginian" at the time she blew her first passing whistle has an important bearing on the question of the "Strathalbyn's" navigation prior to the collision, and the question of the "Virginian's" fault, if any.

The appellant contended in the court below, and will contend in this court, that the "Strathalbyn" was at fault in numerous particulars, all of which were direct contributing causes to this collision; that is, she was at fault, first, in that her regulation lights were not such lights as were required by law, and that the same were too dim to be seen at a distance sufficient to enable an approaching vessel to ascertain her proximity in time to avoid a collision; second, in that her side lights were obstructed by her cargo stanchions, so that they could not be seen from ahead; third, that she had no range lights; fourth, that she failed to stop and reverse her engines promptly upon receiving no answer from the "Virginian" to her passing signals; and fifth, that she failed to blow a danger whistle to notify or warn the "Virginian" of her dangerous

proximity and the danger of collision, which was apparent to the "Strathalbyn."

(B) "STRATHALBYN" WAS GROSSLY AT FAULT IN THAT SHE HAD INSUFFICIENT SIGNAL LIGHTS — THAT HER SIDE LIGHTS WERE OBSTRUCTED SO THAT THEY COULD NOT BE SEEN AHEAD, WHICH FAULT WAS THE PRIMARY AND PROXIMATE CAUSE OF THE COLLISION.

The Court below considered first the faults alleged as to the lights of the "Strathalbyn," *"as first in point of time and so affecting that which followed."* The Court, after an exhaustive review of all the testimony relating to the "Strathalbyn's" lights, their visibility and obstruction by the cargo stanchions, held: *"It is therefore concluded that the side lights of the 'Strathalbyn' were hidden to the 'Virginian' as she approached, and that this was a proximate cause of the collision. It is not clear whether but for the obstruction they could have been seen in time to prevent the collision."* (Apostles, p. 1428.)

In arriving at the above conclusion, the Court found, as a fact from the conflicting testimony, that the "Virginian" and "Strathalbyn" were and had been approaching each other head on for a considerable period prior to the collision; that the "Strathalbyn" *did not port her wheel or change her course at any of the times when she blew her passing signals to the*

“Virginian,” as testified to by her pilot and officers; that the *“Virginian”* did not at any time after leaving Pully Point change her course, and that the two vessels collided at the angle and upon the courses upon which they were approaching each other (the *“Strathalbyn”* approximately N. W. $\frac{1}{2}$ N., and the *“Virginian”* approximately S. E. $\frac{1}{4}$ S.), that is head on, or nearly so.

Having reached the above conclusions and having found the *“Strathalbyn”* guilty of gross initial fault, which was a proximate cause of said collision, the Court did not deem it necessary to consider the other faults alleged against the *“Strathalbyn.”* In view of the Court’s finding that such initial fault of the *“Strathalbyn”* was a proximate cause of the collision, it would not at first seem necessary, on the appeal of the *“Virginian”* from that portion of the decree holding her partly at fault, to discuss or consider any other faults upon the part of the *“Strathalbyn.”* However, the *“Strathalbyn”* committed other grave faults in her navigation immediately prior to the said collision, but for which faults the collision would not have occurred, and which faults, in connection with the initial fault of the *“Strathalbyn”* in having defective and obstructed lights, were of so grave a character as to sufficiently account for the collision, and we contend, therefore, that the burden was on the *“Strathalbyn”* to show that these faults did not constitute the sole cause of the said

collision. We think the rule is clearly stated in the recent case of *The Thielbek*, 218 Fed. 251, decided by the District Court of the District of Oregon:

“Her fault was sufficient to account for the accident, and she is not permitted to escape liability by raising doubt regarding the movements of the *Ocklahoma*. * * * Any doubts arising from her (*Ocklahoma's*) movements, or the contribution of her faults, if any, to the collision, should be resolved in her favor.”

The nature and gravity of the “*Strathalbyn's*” faults will therefore have considerable bearing upon the question of whether or not the “*Virginian*” was guilty of any fault, and if so, whether such fault was a contributing or proximate cause of the collision.

If the lower court's finding that the “*Strathalbyn's*” regulation lights were such lights that “it is not clear whether, but for the obstruction, they could have been seen in time to prevent the collision,” and its finding that these lights were obstructed by the cargo stanchions so that they could not be seen ahead, and that these vessels were approaching head and head prior to the collision are correct findings under the evidence in this case, we think there can be no doubt that such defects in the “*Strathalbyn's*” lights were the initial and proximate cause of this collision, and that such faults were sufficient in themselves to account for the collision, and that the rule as laid down in *The Thielbek* should apply, and the “*Strathalbyn*” should be held solely at fault.

There are certain facts in connection with the "Strathalbyn's" lights which are either admitted or established by undisputed testimony in this case. At the time of this collision, the "Strathalbyn" was approximately two years old, having been built in Scotland. She was equipped with electric running lights but sometime before she was ready to leave for sea on this particular voyage her dynamo broke down and was not repaired prior to her departure. Her builders had supplied her with auxiliary oil lamps, which lamps had never been used prior to the night of this collision. Her regulation electric side lights were placed on either end of her upper or flying bridge, being approximately 24 feet above her main deck, and well clear of any cargo which she could possibly carry on her forward deck. On the night of the collision the "Strathalbyn" was using for the first time these auxiliary oil lights, the same being placed on either end of her chart room bridge, being the bridge immediately underneath her flying bridge, the floor of this chart room bridge being approximately 16 feet above her main deck (Claimant's Exhibits "5-4" and "5-5" being blue prints). At the time of leaving the port of Tacoma on her voyage to Australia, the "Strathalbyn" had aboard a full load of lumber with a heavy load on her forward as well as her after deck. This deck load of lumber was approximately $14\frac{1}{2}$ feet high; that is, measured from the main deck, and was held in place by cargo stanchions placed in a perpendicular position on the main deck inside the

port and starboard rail, the first stanchion forward being approximately eight feet forward of the bridge, and stanchions being placed every ten or twelve feet up to the forecastle head. These stanchions were six by ten inches and 20 feet long. The width of the main deck, at a distance of eight feet forward of the bridge, measured from the inside of the bulb angle of the starboard rail to the inside of the bulb angle of the port rail, was at least 48 feet 7 inches to $7\frac{1}{2}$ inches (Apostles, p. 1420). At a distance of 12 feet farther this distance was 48 feet $5\frac{1}{2}$ inches, and at another 12 feet forward was 48 feet 2 inches, and so on up to the forecastle head, where the distance was approximately 44 feet. (Claimant's Exhibits "5-4," "5-5.") The distance between the outside of the light box screens measured across the lower bridge deck was a distance of not exceeding 46 feet $6\frac{5}{8}$ inches, and the outside of the blocks in the front end of the light screens were not over 47 feet 7 inches. (Libellant's Exhibit Z1.) In other words the stanchions were higher than the side lights and "about six inches and a half further outboard than the side lights. It, therefore follows that, unless this first stanchion on the port side leaned inboard at least six and a half or seven inches at a point level with the lamps used, it would obstruct this light forward." (Opinion of lower court, Apostles, p. 420.)

It was, and is, appellant's contention that the measurement between the light screens was much less than

the above measurement (see Walker's testimony Apostles, p. 1036, and Claimant's Exhibit "5-4"), but for the purposes of this argument we accept libellant's figures as given above.

The "Strathalbyn" contended that this forward deck cargo was so lashed that the stanchions were drawn inboard to such an extent that a light placed in a light screen on the lower bridge deck would not be obscured from ahead. There was some testimony to this effect but the great preponderance of testimony conclusively proved that on the night of the collision the stanchions were so positioned that they did, in fact, obscure the side lights so that they could not be seen from ahead. There was also a direct conflict in the evidence as to the brilliancy of these oil lights. Without reviewing or discussing this evidence in any detail, we are satisfied that the Court's finding that the lights were not proper signal lights, and the further finding that the same were obstructed by the cargo stanchions, are conclusively established by the testimony in the case. The evidence is fully reviewed in the Court's memorandum decision.

(C) NEGLIGENCE IN NAVIGATION OF "STRATHALBYN" PRIOR TO COLLISION.

Other faults of the "Strathalbyn" which we desire to particularly urge were those in reference to her negligent navigation prior to the collision. We will first consider the navigation of the "Strathalbyn" from

the most favorable view, that is, the statement of such navigation as contained in the libel of the Strathalbyn Steamship Company, Ltd., and the answer of the Strathalbyn Steamship Company, Ltd., to the cross-libel of the American-Hawaiian Steamship Company. These allegations, with respect to the course and navigation of the "Virginian," are disproved by the evidence on behalf of the "Virginian," and are found to be unfounded by the District Court; but we are entitled to test the correctness of the navigation of the "Strathalbyn" by her own allegations and her own theory of the facts.

Duluth S. S. Co. vs. Pittsburg S. S. Co., 180 Fed. 652.

Albert Dumois, 177 U. S. 240, 249.

It was the "Strathalbyn's" contention in the court below that at the time she blew her first passing whistle to the "Virginian," the two vessels were approaching each other head on, or nearly so, and by her whistle she indicated to the "Virginian" her intention of passing port to port, but that instead of the "Virginian" complying with her signal and changing her course to starboard, the "Virginian" deliberately changed her course to port so that at about the time the "Strathalbyn" blew her second whistle, the "Virginian's" red light was shut out, her green light being alone visible, and that at the time of blowing her third whistle, this same condition existed. In other words, that the "Virginian" navigated directly contrary to the "strathal-

byn's" passing signal and deliberately crossed her course, making the collision inevitable.

This view, while set out in the original libel of the Strathalbyn Steamship Company, Ltd., is probably more clearly stated in the answer of the Strathalbyn Steamship Company, Ltd., to the cross-libel of the American-Hawaiian Steamship Company (Apostles, pp. 15-18), where it is alleged that after the "Strathalbyn" had passed the "Flyer," and while the "Virginian" and "Strathalbyn" were approaching each other head on, and while the red and green lights of the "Virginian" were both visible and her range lights in line, the "Strathalbyn" blew a single blast of her whistle as a signal of her intention of passing the "Virginian" port to port, but that instead of answering the said signal and navigating accordingly, the "Virginian" swung to port and closed her red light and continued to approach the "Strathalbyn" with little, if any, abatement in her speed. (This was at the time when the "Strathalbyn" was more than one-half way across from Robinson Point to Pully Point, and after she had seen the "Virginian" and "Flyer" approaching north of Pully Point, and after she had heard the "Virginian" and "Flyer" exchange passing signals, and after she had seen the "Flyer" pass the "Virginian" on the "Virginian's" starboard side and proceed some distance ahead of the "Virginian.") It is alleged that in this situation the "Strathalbyn," about a minute later, blew another

single blast of her whistle to the "Virginian," signifying her intention to pass port to port, but that instead of responding to this second passing signal and navigating accordingly, the "Virginian" continued to swing to port, or across the "Strathalbyn's" course; that in this position the "Strathalbyn," after waiting approximately one minute, and after having stopped her engines shortly after the second passing blast, blew the "Virginian" another single blast, indicating her intention to pass port to port; that the "Virginian" failed to answer this third passing blast or to navigate according thereto, and continued to swing to port or across the "Strathalbyn's" course; and that it then becoming evident for the first time that the "Virginian" was failing and neglecting to conform to the rules of the road, and that there was danger of a collision, the "Strathalbyn" blew a danger whistle to the "Virginian" and reversed her engines full speed astern.

These allegations are substantiated to some extent by the testimony of Beecher, the pilot of the "Strathalbyn." His testimony is that when the "Strathalbyn" rounded Robinson Point, he noticed lights of two steamers ahead, off of and north of Pully Point; that he saw the steamship "Flyer," which was on the inside course, disappear and then reappear on the starboard side of the "Virginian." That subsequently the "Strathalbyn" met the "Flyer" between Pully Point and Robinson Point, and that when be-

tween a half or a quarter of a mile away, the "Strathalbyn" blew one blast of her whistle to the "Flyer," which was answered by the "Flyer;" that at this time the "Virginian" was approaching the "Strathalbyn" in such a position that both of her side lights were visible and her range lights were in line, showing that she was approaching directly head on; that when the "Strathalbyn" had the "Flyer" abeam or abaft of her beam, she gave her first passing signal to the "Virginian;" that prior to signalling the "Flyer" the "Virginian's" side lights and range lights were all visible, slightly on the "Strathalbyn's" port bow, indicating that the "Virginian" was approaching the "Strathalbyn" practically head on. That at the time of the giving of the passing signal to the "Flyer," the lights of the "Virginian" were the same, and at the time of giving the first passing signal to the "Virginian" her lights were the same, indicating that she was, during all of this time, approaching head on. That the "Virginian" did not answer this first passing whistle of the "Strathalbyn," but that despite this fact, the "Strathalbyn" continued full speed ahead for another minute and then gave the "Virginian" another or second passing whistle. That up to the time of giving this second passing whistle, the "Virginian" had been approaching practically head on, so that all of her lights were visible. That at the time of giving this second passing whistle, he noticed that the "Virginian's" red light was getting dimmer and that her range lights were

opening up; that upon noticing this change in the "Virginian's" course, which indicated that she was crossing the "Strathalbyn's" course, he stopped the "Strathalbyn's" engines, but did not reverse them, so as to take the headway off of his vessel. That after waiting about another minute, and noticing that the "Virginian's" red light had entirely shut out, and that her range lights were opening broad, he gave the "Virginian" a third passing signal, indicating his intention to pass her port to port, and that about a minute after he had given this third passing whistle, noticing that the "Virginian's" range lights had opened wide and that her green light was alone visible, he blew a danger whistle and immediately thereafter put his engines full speed astern. That the "Virginian" answered this danger whistle with three blasts of her whistle, indicating that her engines were going full speed astern, and that very shortly thereafter the two vessels came into collision. (Apostles, pp. 203-218.) This is Beecher's testimony in the most favorable light to the "Strathalbyn." There are many inconsistencies and discrepancies in his testimony, which we will point out to the Court later on in this brief. For the purpose of the present argument we will accept the above statement as to the "Strathalbyn's" navigation.

This witness further testified with great detail that at the time of the blowing of each of his three passing whistles to the "Virginian," he ordered the

helm of the "Strathalbyn" ported, and that at the time of the collision the "Strathalbyn's" bow was swinging to starboard.

Considering for a moment that the allegations of the "Strathalbyn's" libel and the answer to the cross-libel, and the testimony of her pilot were all true, we think that these allegations and this testimony, themselves, condemn the "Strathalbyn" of gross and negligent fault in her navigation. The "Strathalbyn," upon rounding Robinson Point, saw the lights of the "Virginian" and the "Flyer" north of Pully Point, approximately five miles away. At the time the "Flyer" passed the "Virginian" in the vicinity of Pully Point, the "Strathalbyn" heard the "Flyer" and the "Virginian" exchange passing whistles. After the "Flyer" had passed the "Virginian" and the "Virginian" had straightened on her course for Robinson Point, the "Strathalbyn" could see both side lights of the "Virginian" and could see that her range lights were in line, which indicated that the two vessels, at that time at least two or three miles apart, were approaching on directly opposite courses. The vessels continued to approach each other head and head, up to the time the "Strathalbyn" whistled to the "Flyer," the "Flyer" at this time being some considerable distance off the "Strathalbyn's" port bow, and of necessity some distance off of the "Virginian's" starboard bow. At this time the "Strathalbyn" and the "Virginian" were pos-

sibly a mile apart and continued to approach each other until the "Strathalbyn" was abeam of the "Flyer," at which time the vessels were not over half a mile apart (nearer a quarter of a mile). The "Virginian" did not answer the first passing whistle blown by the "Strathalbyn" when she was abeam of the "Flyer," and the vessels being in rather close proximity at this time, it was hardly conceivable that the "Virginian" did not hear the "Strathalbyn's" whistle. The "Virginian's" failure or refusal to answer this whistle could indicate only one thing to a competent navigator; that is, that the "Virginian" could not see the "Strathalbyn" or any of her lights and that therefore, under the rules, she was unable to answer the "Strathalbyn's" passing whistle.

Article 18, Rule 1, of the Inland Rules provides:

"When steam vessels are approaching each other head and head, that is, end on, or nearly so, it shall be the duty of each to pass on the port side of the other, and either vessel shall give, as a signal of her intention, one short and distinct blast of her whistle, which the other vessel shall answer promptly by a similar blast of her whistle, and thereupon such vessels shall pass on the port side of each other. * * * The foregoing only applies to cases where vessels are meeting end on or nearly end on in such a manner as to involve risk of collision. In other words, to cases in which by day *each vessel sees the mast of the other in a line or nearly in a line with her own*, and by night *to cases in which each vessel is in such a position as to see both the side lights of the other.*" (Italics ours.)

Article 18, Rule IX, provides:

“The whistle signals provided in the rules under this article for steam vessels meeting, passing, or overtaking, are never to be used except when steamers are *in sight of each other, and the course and position of each can be determined* in the day time by a sight of the vessel, itself, *or by night by seeing its signal lights*. In fog, mist, falling snow, or heavy rain storms, when vessels can not so see each other, fog signals only must be given.” (Italics ours.)

Article 18, Rule I, is practically identical with Rule III of the Pilot Rules of the Inland Waters of the Atlantic and Pacific Coasts, effective August 20, 1908.

In place of Rule IX of Article 18, Rule III of the Pilot Rules provides as follows:

“The signals for passing, by the blowing of the whistle, shall be given and answered by pilots, in compliance with these rules, not only when meeting ‘head and head,’ or nearly so, but at all times, when the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each other, and whether passing to the starboard or port. The whistle signals provided in the rules for steam vessels meeting, passing, or overtaking, are never to be used except when steamers are *in sight of each other, and the course and position of each can be determined* in the day time by a sight of the vessel itself, *or by night by seeing its signal lights*. In fog, mist, falling snow or heavy rain storms, when vessels can not so see each other, fog signals only must be given.”

Under these rules, the “Virginian” was prohibited from answering the passing signal of the “Strathalbyn,” if she was unable to see the “Strathalbyn” or was unable to see her signal lights. This is the only ground upon which she could be excused from answering the

“Strathalbyn’s” passing signal, and the lower court held:

“Doubtless the inability of competent and vigilant men on the lookout of the “Virginian” to make out either the “Strathalbyn” or her lights excused the “Virginian” from not accepting and answering the port to port passing signal of the “Strathalbyn,” provided for by Rule I. (Apostles, p. 1434.)

(Capt. Sprague’s testimony, Apostles, p. 1397.)

At the time the “Strathalbyn” blew this first passing whistle, the “Virginian” and “Strathalbyn” had been approaching each other for at least four or five minutes on directly opposite courses, during which time the bearing of the “Virginian’s” lights had not changed, which, under the rules, indicated to the “Strathalbyn” that there was risk of a collision.

INLAND RULES, ARTICLE IV, STEERING AND SAILING RULES. PRELIMINARY.

“Risk of collision can, when circumstances permit, be ascertained by carefully watching the compass bearing of an approaching vessel. If the bearing does not appreciably change, such risk should be deemed to exist.”

The “Virginian’s” failure to answer the “Strathalbyn’s” first blast made this risk of collision all the more imminent. Still, the “Strathalbyn” did not stop her engines or even slacken her speed, but proceeded full speed ahead for about a minute, and gave the “Virginian” a second blast, at which time the vessels were still head on and considerably less than half a mile apart. At this time the “Strathalbyn” had full knowledge that the “Virginian” could not see her or

her signal lights, and the "Virginian," of course, by reason of the repeated signals of the "Strathalbyn," had knowledge that the "Strathalbyn" could see her, knew her location and was indicating that she was changing her course to starboard with the intention of passing port to port, and with full knowledge of the "Virginian's" location and the situation of the two vessels, considered that this maneuver was safe. According to the "Strathalbyn's" testimony and pleadings, at the time of or after the blowing of this second blast to the "Virginian," the "Virginian's" red light became dimmer and shut out from vision, and her range lights were opening up so that the "Virginian's" green light was alone visible. In this position the "Virginian's" green light was exposed to the "Strathalbyn's" red light, and the "Virginian's" range lights were opening up, indicating that she was crossing the "Strathalbyn's" course contrary to the "Strathalbyn's" signals, which maneuver not only made the risk of collision imminent, but in view of the close proximity of the vessels, made the collision inevitable, unless immediate steps were taken to avert the same. This was fully realized by the pilot of the "Strathalbyn" (Apostles, p. 226). As we have stated before, the "Virginian's" failure to answer this second blast from the whistle of the "Strathalbyn," when the two vessels were considerably less than half a mile apart, could only indicate to a competent navigator that the "Virginian's" officers were still unable to make out the

“Strathalbyn” or any light aboard of her, and were therefore unable and unwilling to answer the “Strathalbyn’s” passing signal. At this time the “Strathalbyn” claims to have stopped her engines, but took no steps to reverse the same so as to slacken her headway, nor did she give the “Virginian” a danger signal to warn the “Virginian” of the dangerous situation of the two vessels.

The “Strathalbyn” was heavily loaded with a cargo exceeding 3,000,000 feet of lumber, 14½ foot deck load, forward and aft, with a 6° list to starboard, and according to her testimony was making a little better than six knots an hour under full speed. Of course, with such speed and such a cargo, she had a tremendous momentum, and with a 6° list to starboard she was not entirely manageable in the sense of being able to maneuver rapidly so as to avoid danger. (Apostles, p. 1398.) After stopping her engines, the “Strathalbyn,” according to her testimony, proceeded under her momentum for approximately another minute, during which time, according to her testimony, the “Virginian’s” range lights opened broad, indicating that the “Virginian” was heading directly across the “Strathalbyn’s” course, which alleged maneuver of the “Virginian” of course was directly contrary to the signals which she had received from the “Strathalbyn.” At this time the vessels were in very close proximity, and in a situation of imminent peril. The “Strathalbyn” instead

of warning the "Virginian" of the danger, persisted in giving her another or third passing whistle at the same time proceeding ahead under her full momentum, with the engines stopped but not reversed. After giving this third passing whistle to the "Virginian" and having received no response from the "Virginian," which indicated to the "Strathalbyn" that neither her lights nor the vessel itself were seen by the "Virginian," the "Strathalbyn," according to her pleadings, waited approximately another minute until the vessels were in such proximity that a collision was inevitable, at which time she finally blew her danger whistle to the "Virginian" and subsequent thereto reversed her engines to take the headway off the ship. The collision occurred almost immediately thereafter.

In the case of *The New York*, 175 U. S. 187, Mr. Justice Brown, delivering the opinion of the Supreme Court of the United States, laid down a positive rule, which has since been followed by all of the admiralty courts in this country:

"Nothing is better settled than that if a steamer be approaching another vessel which has disregarded her signals, or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty. *The Louisiana vs. Fisher*, 21 How. 1, 16 L. ed. 29; *Chamberlain vs. Ward*, 21 How. 548, 16 L. ed. 211; *Nelson vs. Leland*, 22 How. 48, 16 L. ed. 269; *The Martello*, 153 U. S. 64, 71, sub, nom. *The Martello vs. Willey*, 38 L. ed. 637, 640, 14 Sup. Ct. Rep. 723; *The Teutonia*, 23 Wall. 77, sub nom.; *Sieward vs. The Teutonia*, 23 L. ed. 44; *The James*

Watt, 2 W. Rob. 271; *The Birkenhead*, 3 W. Rob. 75; *The Hermann*, 4 Blatchf. 441, Fed. Cas. 6408; *The Huntsville*, 8 Blatchf. 228, Fed. Cas. 6915; *The Hammonia*, 4 Ben. 515, Fed. Cas. 6005; *The Mary Sandford*, 3 Ben. 100, Fed. Cas. 9225; *The Arabian*, 2 Stuart, Vice Adm. 72.

There was peculiar necessity for such action in this case. These vessels were about to meet upon crossing courses and to pass each other in the narrowest part of the channel. *The Conemaugh* had three times signaled her wish to take the Canadian side and pass starboard to starboard. *The New York* had three times neglected to give her assent to this arrangement. *The Conemaugh* had construed her failure to reply as an acquiescence to her own signals. *The New York* might have construed such failure as a refusal to acquiesce. In such a case it was clearly incumbent upon *The Conemaugh* to stop until the mystery of her silence was explained, and in failing so to do she was guilty of fault."

And again, at page 207, Justice Brown states:

"The lesson that steam vessels must stop their engines in the presence of danger, or even of anticipated danger, is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect. We cannot impress upon the masters of steam vessels too insistently the necessity of caution in passing or crossing the course of other vessels in constricted channels."

The case of *The Duluth S. S. Co. vs. Pittsburg S. S. Co.*, decided by the Circuit Court of Appeals for the Sixth Circuit in 1910, is particularly applicable to the case at bar, and we will therefore take the liberty of citing from this case at some length.

"The crew of *The Bessemer* testified that she and *The Sylvania* exchanged four single blast signals, while the crew of *The Sylvania* testify that she sounded three two-blast signals and exchanged only one single blast signal with *The Bessemer*, and this was just a few moments before the collision. We shall not further notice the evidence of the crew of *The Trevor* nor that of *The Sylvania* in determining the question of negligence on the part of *The Bessemer*, but base the decision of that question alone on the testimony of *The Bessemer's* crew, and it shows substantially the following facts:

These vessels were three-quarters of a mile distant from each other when first sighted. They were approaching nearly head on and perhaps each was slightly on the starboard quarter of the other. *The Sylvania* was passing, or had just passed the stem of *The Trevor*, showing her green light to *The Bessemer*, and continued showing her green light until within two lengths from *The Bessemer*. During this time the two vessels were exchanging one blast passing signals, and yet the master of *The Bessemer* saw that *The Sylvania* was being managed as if under a two-blast signal; that is, steering her course to her left or port side, contrary to the signals which the crew of *The Bessemer* say were exchanged.

The Sylvania had proceeded from a point three-quarters of a mile away to within a length and a half or two lengths of *The Bessemer*, under an agreement to pass port to port, while all the time she was moving in a direction contrary to the passing agreement, and across the bow of *The Bessemer*, which had begun to change her course to starboard on exchange of the first passing signal, and up to a few minutes before the collision she was swung four points to starboard. *The Sylvania* was not steered in accordance with the agreement until within a length or two lengths away, when she changed her course in an attempt to pass port to port. It was then too late and the collision occurred. When *The Sylvania* was opposite to the stern of *The Trevor*, she showed her green light to *The Bessemer*. She was moving as if under a two-blast signal down across the bow of *The Bessemer*, but ex-

changing one blast signals, according to the testimony of *The Bessemer's* crew.

It must have been clear to *The Bessemer* that something was radically wrong with *The Sylvania*, or that there was a grave misunderstanding as to the passing agreement, and yet *The Bessemer* did not stop or blow an alarm signal. 'In order to determine where the fault lies, it usually becomes necessary to examine with care the conduct and orders of those in charge of the respective vessels from the time the vessels come in sight of each other to the time they came together.' *The Wenona*, 19 Wall. 41, 22 L. ed. 52. This rule is important here. When the colliding vessels became factors in their proper navigation with relation to each other they were three-quarters of a mile apart. Each of them has the other on her starboard quarter by one-half a point, and had this relation continued the vessels would have passed starboard to starboard in safety. *The Sylvania* was abreast of *The Trevor* when the second short blast signals were exchanged showing her green light to *The Bessemer*, when on *The Trevor's* stern, according to the witness Captain Hoag, of *The Bessemer*. He was then asked as follows:

'Q. If *The Sylvania* was making the course that you have described, would not that indicate danger to you?

A. It did when she showed her green light, not before that.

Q. You could see that she (*Sylvania*) was swinging by her lights, couldn't you?

A. Yes, sir.

Q. Quite contrary to her signals?

A. Yes, sir.

Q. And then she proceeded in that course from the time she was abreast of *The Trevor*, at least until just before the collision, when you say you saw her swing slightly as if under a port helm?

A. Yes, sir.

Q. Where was she when she showed her red light?

A. About a length and a half away—a length away.'

Under these conditions *The Bessemer* did not stop nor blow the danger whistle.

Witness Bugge says that he exchanged one blast signals with *The Sylvania* the second time she was abreast of *The Trevor*; the third time a little past *The Trevor*, when she was swinging on her starboard wheel. He then said to the master: 'There is something wrong with that fellow—he is swinging on his starboard wheel instead of on his port wheel, I believe.' Captain: 'Yes, I believe he is, we will have to stop and back.' Mate: 'Yes, we will.' But he did not stop, for the mate says that about that time he blew the fourth signal and then said to the master: 'We will have to back. He is swinging and we will never clear him.' Captain: 'All right, back her.'

The master and the mate of *The Bessemer* substantially corroborate each other in their testimony, which clearly shows that the danger was apparent all this time and yet *The Bessemer* was not backed nor danger signals given. 'The lesson that steam vessels must stop their engines in the presence of danger or even of anticipated danger is a hard one to learn, but the failure to do so has been the cause of the condemnation of so many vessels that it would seem that these repeated admonitions must ultimately have some effect.' *The New York*, 175 U. S. 187.

What was *The Bessemer's* duty under her own testimony? The master of *The Bessemer* saw that *The Sylvania* was not doing her duty under the passing agreement, which he says had been reached, and that if her course was kept up a collision was inevitable, yet he relied upon *The Sylvania* to change her course so as to pass according to the agreement as *The Bessemer* understood it, and he continued to rely upon *The Sylvania* to avert the accident until it was too late for either to do so. To *The Bessemer* it was a clear case of apparent danger of collision with time to avoid it. She could have stopped or blown the danger signal when it was first apparent that *The Sylvania* was less than three-quarters of a mile away, moving rapidly and in violation of the passing agreement. *U. S. vs. Erie R. R. Co.*, 172 Fed. 50, 96 C. C. A. 538; *Hall vs. Chisholm*, 117 Fed. 807, 55 C. C. A.

31; *Lake Transportation Co. vs. Gilchrist Transportation Co.*, 142 Fed. 89, 73 C. C. A. 313; *The Elphicke*, 123 Fed. 405, 59 C. C. A. 286.

As has been seen, it appears that the crew of *The Bessemer* heard the signal of one blast from *The Sylvania* when three-quarters of a mile away, which was twice repeated. She was showing her green light when she should have taken the opposite course and shown her red light. *The Bessemer* was apprised of the fact that *The Sylvania* was violating a rule of navigation and prompt action was required to avoid a collision. 'Nothing is better settled than that if a steamer be approaching another vessel which has disregarded her signals or whose position or movements are uncertain, she is bound to stop until her course be ascertained with certainty.' *The New York* (supra). And again: 'And if the vessels shall have approached within a half a mile of each other, both shall reduce their speed to bare steerage way, and if necessary stop and reverse.' Rule 28 of the White Law. If it were permissible for those responsible for the navigation of a great vessel, having in their care human life as well as property, to speculate as to whether they should adopt the safest course or one least safe, when both are equally open to them in the face of real or apparent danger, perhaps *The Bessemer*, under all the facts, should escape liability in this case. But such speculation should not be tolerated or excused. Navigation is fraught with such great danger, both to life and property, that it would be most hazardous that the court should approve a rule of action less exacting than that which requires of the officers of vessels, when in the face of danger, real or apparent, and in all cases if within the range of possibility, to adopt that course that is the safest and which offers the greatest assurance of avoiding such danger."

See also the following cases:

Albert Dumois, 177 U. S. 240.

The J. B. King, 106 Fed. 980.

Mallory Burns, 106 Fed. 86.

Oceanic, 61 Fed. 359.

The Gerry, 161 Fed. 413.

The Kingston, 173 Fed.

Wilder S. S. Co. vs. Low, 112 Fed. 161.

New York, etc. Co. vs. New York, 42 N. E. 1086.

And cases cited in the *New York supra*.

The Strathleven, 213 Fed. 975, 978.

Pittsburg S. S. Co. vs. Duluth S. S. Co., 222 Fed. 834, 835.

In the case of *The Duluth S. S. Co. vs. Pittsburg S. S. Co.* (*supra*), and also in the case of *Albert Dumois* (*supra*), the court adopted the same method which we are pursuing in this case, of considering the fault of a vessel solely upon the testimony of the officers and crew of that vessel, irrespective of the testimony on the opposing side. In the *Duluth* case it appears from the testimony of *The Bessemer* that she had blown four separate signal blasts to *The Sylvania*, indicating a port to port passage, and that these passing signals had all been assented to by *The Sylvania*. It also appears in that case that the two vessels were in plain sight of each other, so that each vessel could determine by sight the navigation being pursued by the other vessel.

In the case at bar there is no contention on the part of the "Strathalbyn" that any of her passing signals were answered or assented to. Further than this, it must have appeared to a competent navigator on the "Strathalbyn" that her passing signals were not answered or assented to for the reason the "Virginian" could not see either the "Strathalbyn" or her signal lights, and therefore had no information whatever as

to the location or navigation of the "Strathalbyn," except as indicated by her whistles. These facts make the navigation of the "Strathalbyn," as testified to by her own officers, much more culpable than the navigation of *The Bessemer* in the above case. *The Bessemer* might, with some reason, have assumed that *The Sylvania* would, under the circumstances, have changed her course in time to avoid a collision, and navigated in accordance with *The Bessemer's* passing signal; or she might well have assumed that *The Sylvania*, having *The Bessemer* in full sight, would have indicated the danger to *The Bessemer*, if for any reason she did not intend to navigate in accordance with *The Bessemer's* passing signals. No such assumption was possible to the officers of the "Strathalbyn" in the case at bar. The "Strathalbyn" had heard the "Virginian" and "Flyer" exchange passing signals in the vicinity of Pulley Point some minutes before the "Strathalbyn" blew her first passing signal to the "Virginian," and she therefore knew there was some one on watch on board the "Virginian," attending to her navigation and answering signals when necessary or permitted; that is, when she could see the vessel which had initiated the signal. She had also watched the bearing of the "Virginians" lights for some time and knew that that vessel was approaching her on a practically head-on course. She further knew that there was danger of collision unless the courses of the two vessels were changed. She gave the "Virginian" a pass-

ing signal when the two vessels were not over a half a mile apart, and upon the "Virginian's" failure to answer this signal, it was the "Strathalbyn's" imperative duty, under the above cases, to have immediately taken the headway off the vessel and brought her to a standstill, until she had reached an agreement with the "Virginian." Instead of doing this, she proceeded full speed ahead for a minute or more and gave the "Virginian" a second passing whistle, which likewise remained unanswered.

In the case of *The New York*, cited above, in considering the navigation of the *Conemaugh*, Justice Brown states her duty to have been as follows:

"As the *Conemaugh* steadied her wheel to star-board her watch made out below the tow and about a mile distant the white and red lights of *The New York*, apparently somewhat on the American side of mid-channel, and promptly signalled her with two blasts of her whistle, indicating that she would pass her to the left. No answer was received from *The New York*. Under such circumstances it would have been more prudent for the *Conemaugh* to stop and wait a few minutes until the tow had drifted down and left the channel clear below her; but inasmuch as there was a clear space of five hundred feet of navigable water between the last barge and the Canadian bank of the channel, we should hesitate to condemn her for this fault were there no others contributing more immediately to the collision.

Receiving no answer to her first blast, the *Conemaugh*, when the two steamers were about three-quarters of a mile apart, repeated her signal of two blasts—*The New York* then showing her mast head and both colored lights. Again no reply was made by *The New York*. The *Conemaugh*, which had then

ported, and was heading towards the Canadian shore, and about four points from the direct course down the river, gave a third signal of two blasts, *The New York* continuing to show all three of her lights and being apparently close to and between the second and third barges of the tow. *The New York* made no answer to this third signal. The duty of *The Conemaugh* at this juncture was plain. *She should have stopped her engines after the second signal and, if necessary to bring her to a complete standstill, have reversed them.*" (Page 201.) (Italics ours.)

The court will note that in the *New York* case, at the time the *Conemaugh* gave the first signal, the vessels were more than a mile apart, were not headed directly towards each other, and that there was an obstruction in the channel between the two vessels, and that under these circumstances the court did not feel that it should hold the *Conemaugh* at fault solely for her failure to stop upon receiving no answer from the *New York* to her first passing signal. Upon the other hand, at the time of giving the second signal, the two vessels were still three-quarters of a mile apart, but were headed towards each other, and under these circumstances the court held it the imperative duty of the *Conemaugh* to have stopped and reversed so as to come to a standstill.

In the case at bar, at the time the "Strathalbyn" gave to the "Virgiinian" the first passing signal, the vessels were considerably less than half a mile apart and headed directly towards each other, and had been so headed for some minutes prior to this time. In view of this situation, we think it was the imperative

duty of the "Strathalbyn" to have immediately stopped and come to a standstill upon failing to receive an answer from the "Virginian" to her first whistle. However, instead of doing this, she proceeded full speed ahead for a minute or more and gave the "Virginian" a second passing whistle, which likewise remained unanswered. At this time, according to her testimony, she noticed the "Virginian" was navigating directly contrary to her ("Strathalbyn's") passing signals. At this time the "Strathalbyn" testifies that she stopped her engines, but under the rule as laid down in *The New York* this was clearly insufficient. Having blown two passing signals and received no answer, it was her imperative duty, provided she had not done so after blowing the first passing whistle, to have stopped and reversed immediately, and this became the more imperative when it was noticed that the "Virginian" was navigating contrary to the passing signals. This situation brings the case at bar within the *Duluth* case. It was certainly a "clear case of apparent danger of collision" in time for the "Strathalbyn" to have avoided it, and, as stated in the *Duluth* case, "she could have stopped or blown the danger signal when it was apparent that *The Sylvania* was less than three-quarters of a mile away, moving rapidly in violation of the passing agreement."

In the case at bar, no passing agreement had been reached, which made it the more imperative on

the part of the "Strathalbyn" to have immediately stopped and reversed and blown the danger signal when it became apparent to her that the "Virginian," which was then considerably less than half a mile away, was navigating contrary to her ("Strathalbyn's") passing signal. Instead of reversing at this time, the "Strathalbyn" proceeded under a full momentum for a minute or more, when, according to her testimony, the "Virginian" shut out her red light entirely, was showing her green light against the "Strathalbyn's" red light and was opening her range lights so as to indicate that she was proceeding directly across the "Strathalbyn's" course. In this situation it would have been apparent to any one, whether a navigator or not, that there was imminent danger of collision, but instead of reversing, even at this late time, the "Strathalbyn" persisted in blowing a third passing whistle and shortly thereafter, when collision was inevitable and at a time when neither vessel could possibly avoid it, the "Strathalbyn" blew a danger whistle and *after blowing such whistle, reversed her engines*. Such navigation cannot be too strongly condemned. If the "Strathalbyn" had reversed even at the time of blowing her second whistle, the collision would have been avoided as it is shown by the testimony cited at pages 109-111 of this brief that at the time of the collision both vessels were practically without forward motion.

The court will remember that during all of this time the "Virginian" had not assented to nor answered a single passing whistle blown by the "Strathalbyn." Under the rules for the prevention of collisions, the "Virginian" was prohibited from assenting to or answering the "Strathalbyn's" signals, and the lower court has so held, and as we have repeatedly stated, this refusal to assent to such passing signals indicated to the "Strathalbyn," in the only manner which is provided or permitted by the Inland Rules, that the "Virginian" could not see the "Strathalbyn." The "Strathalbyn" had the "Virginian" in full sight, knew the course she was steering, and could see by the bearing of her lights, and especially by the location of her range lights, a variance, if any, in the "Virginian's" course. She had indicated this knowledge to the "Virginian" by blowing her passing signals.

From the testimony of the "Strathalbyn's" pilot, he must have been in considerable doubt as to the course and intention of the "Virginian," especially if the "Virginian" was deliberately crossing his course, as he has testified that she was doing.

Rule III of Article 18 of the Inland Rules provides as follows:

"If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short

and rapid blasts, not less than four, of the steam whistle."

Rule I of the Pilot Rules of the Inland Waters of the Atlantic and Pacific Coasts provides:

"If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle, the danger signal. Whenever the danger signal is given the engines of both vessels shall be stopped and backed until the headway of the steamers has been fully checked; nor shall the engines of either steamer be again started until the steamers can safely pass each other and the proper signals for passing have been given, answered and understood."

In the *Duluth* case (supra), *The Bessemer* was held guilty of negligence "in not stopping and reversing her engines before the vessels came so close together that it was impossible to avoid the accident, and in not blowing the alarm signal."

In the case of *The Volund*, 181 Fed. 643, a steamer was found at fault in the case of a collision with a yacht under the very same circumstances as the case at bar, the steamer having signalled to the yacht and having received no answer or assent thereto.

"But whether the vessels were or were not end on, or nearly so, the ship was at fault on her testimony for violating Rule III of Article 25, which directs that 'if when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall imme-

diately signify the same by giving several short and rapid blasts, not less than four, of the steam whistle,' and she was also at fault for violating the Inspectors' Rule, which provides that if in the situation quoted from the statute the vessels have approached within half a mile of each other, 'both shall be immediately slowed to a speed barely sufficient for steerage way until the proper signals are given, answered, and understood, or until the vessels have passed each other.' "

In the above case, the steamer was also held at fault for attempting to pass the yacht on the left under a two-blast signal, without having obtained the consent of the yacht; also for not sounding alarm signals, but keeping at full speed and repeating her two blasts when *her first signal was not answered*; and also for not stopping and reversing when danger of collision should have been obvious.

Certainly, when the "Strathalbyn's" first signal had remained unanswered and when her second signal had remained unanswered, and if it was noticed, as testified to by the "Strathalbyn's" pilot, that the "Virginian" was changing her course contrary to said signals so as to make a collision imminent, the "Strathalbyn" at this time was in doubt as to the course and intention of the "Virginian," and it was her duty, under the rules, to have immediately signified such doubt and to have stopped and reversed her engines. There seems to us to be absolutely no escape from this conclusion. Captain Beecher, pilot of the "Strathalbyn," testified that he thought this was negligent navigation on the part of

the "Virginian" (Apostles, p. 226), but we submit that under the authority of the *New York* case and the *Duluth* case, he was not permitted to indulge in any such speculation, but was required to make use of the danger signal, which is provided for exactly such emergencies.

Without going into Captain Beecher's testimony in detail, we would ask the court to examine the same at pages 224-5-6-7-8 of the Apostles, from which it is clear that this pilot does not give a frank statement of the situation as it appeared to him at the time, but is obviously trying to escape the effect of his failure to blow the danger signal. He testified that his only reason for stopping the "Strathalbyn's" engines, after blowing the second whistle, was that his vessel was headed directly into the beach, by reason of his porting at the time of blowing the single blast whistle, and that this had nothing whatever to do with any maneuver on the part of the "Virginian"; that he stopped his vessel because of the shallow water directly ahead of him; that he merely concluded that the "Virginian" was being badly steered and that she would swing out again in time to avoid a collision. On pages 226-227 he testified as follows:

"Q. What conclusion did you reach to your second whistle at so close a distance getting no answer, and losing his red light?

A. Well, I don't know that I can explain that, Mr. Hughes. One of my conclusions was that probably he may have given the order port and the quartermaster

in the closed wheelhouse had put the helm starboard; that was merely a mental thought through my mind. I could not understand what he was doing.

Q. If such a mistake had been made, it would create the imminence of a collision at once?

A. *Certainly, if one starboards and the other ports, you are bound to come together.* (Italics ours.)

Q. What conclusion did you reach at his failing to answer your port whistle—your second port whistle?

A. I did not reach any. I thought they were very slack in their business, but if they had as many men as they usually have, some of them must have heard.

* * * * *

A. I could not do anything else, I was in irons.

Q. That is why you did?

A. Yes, sir.

* * * * *

Q. Why did you give that third port whistle?

A. I could not help myself. He was forcing me into the beach. I had nothing else to do. * * *

Q. What did occur to you as an explanation to your mind, as a pilot, of the fact that a vessel whose lights you could plainly see, that was so near that they must necessarily hear your whistles, gave you no answer?

A. I cannot state. I do not know."

In contradiction of the above testimony, we quote the testimony of this witness given before the United States Inspectors of Hulls and Boilers immediately after this collision.

"I made the remark after I blew my first whistle, the red light seemed to be getting dimmer, but the green light very much brighter. I said 'I wish to God he would get his helm to port and show me his red more.' I then blew, not hearing from him, I blew my second blast to him and stopped her right then because the red was getting dimmer all the time." (Apostles, p. 233.)

In order to back up his explanation and in an attempt to evade the requirements of the danger whistle, this witness, upon cross-examination, placed his location on the chart well inside of Pulley Point and close to the beach. (Indicated by the letter B on chart marked Libellants' Exhibit "B.") An examination of this exhibit will show that the location of the "Strathalbyn," as placed by Captain Beecher, is utterly absurd. In order for the "Virginian" to have ever reached this location she would have to have made a complete circle around Pulley Point and headed directly into the beach, and we doubt if it would have been possible for the "Virginian" to have made such a quick turn. If she had made any such change in course it must have been for the deliberate purpose of running down the "Strathalbyn."

After going over this matter with his proctor, the witness saw the absurdity of his testimony and was recalled on the following morning for the purpose of correcting the same. At this time he placed his position from one and a half to two miles away from where he had placed it the day before, at about mid-channel or about one and a half or two miles from shore, where there was no shallow water and where there was no possibility of his ship being in irons, or of any fear of it being run on the beach. (Apostles, p. 277-8-9.) This latter position as shown by the letter B3 on Libellants' Exhibit "B" is much nearer where

the collision actually took place. This latter testimony absolutely destroys the pilot's explanation as to his reasons for stopping and shows conclusively that he stopped because of the imminent danger of collision with the "Virginian."

This contradiction in the testimony of the most important witness on the "Strathalbyn," in the most important detail of the entire case, tends strongly to discredit his entire testimony in the case. We submit that Captain Beecher's testimony, despite his apparent attempt to avoid it, shows that he was in considerable doubt as to the course and intention of the "Virginian," and that he should have blown a danger signal, certainly not later than the time he blew his second passing signal.

There is another fault on the part of the "Strathalbyn" which we desire to discuss before leaving this phase of the case. In our opinion this particular fault is most serious as the collision could not otherwise have occurred. It will be noted in the pleadings of the Strathalbyn Steamship Company it is alleged that at *each time of blowing the port passing whistles to the "Virginian," the vessel was ported so as to throw her to starboard and give the "Virginian" further clearance.* The Pilot Rules of Inland Waters of the Atlantic and Pacific Coasts provide:

"One short blast of the whistle signifies the intention of or assent to the steamer first giving the signal to direct course to own starboard."

This is similar to Rule 28 of the International Rules.

The purpose of this signal, therefore, is to signify to an approaching vessel that the vessel blowing such signal blast sees such approaching vessel and is changing her course to starboard for the purpose of avoiding such vessel.

In the present case it is testified by the "Strathalbyn's" officers that her course was changed to starboard at the time of blowing each of the three passing signals. Captain Beecher, pilot of the "Strathalbyn," testified that at the time of giving the first passing whistle to the "Virginian," he ordered the wheel of the "Strathalbyn" ported, so that she was headed just inside of Pulley Point, Pulley Point being about a half a point off the "Strathalbyn's" port bow (Apostles p. 223); that upon giving the second passing whistle to the "Virginian," the "Strathalbyn" was again ported so that she was headed inside of Pulley Point, and at the time of giving the third passing whistle, the "Strathalbyn" was again ported so that she was headed more towards the land in a southerly and easterly direction (Apostles, p. 209); that he changed her course at least three and a half points to starboard. (Apostles, p. 232.) This testimony is substantiated to some extent by the quartermaster at the wheel of the "Strathalbyn." (Apostles, p. 329-330.)

This testimony is manifestly untrue, as the "Strathalbyn's" own witnesses claim that the two vessels came together at an angle of contact at from three to three and a half points. The testimony of the independent expert surveyors who surveyed these vessels after the collision shows conclusively that the vessels came together head on, or nearly so, and that the damage to the vessels could not have been caused if the vessels had come together at any considerable angle. (Erissman, p. 1113, p. 1116; Gibbs, p. 1134, p. 1142; Fowler, p. 1149-1150; Sprague, p. 1398.) The lower court, after an examination of this evidence, has found as a fact that the vessels did come together head on:

"It is clear that the vessels, on opposite courses, came into practically a head-on collision. Probably the courses were not over a point off of being directly opposite. *This conclusion is at variance with much testimony as to the repeated porting of the helm of the 'Strathalbyn,' the change in the 'Virginian's' course to port and other testimony, expert and otherwise; but all of this is overborne by the evidence of contact left upon the vessels after the collision.* (Italics ours.)

The 'Strathalbyn,' at the time of the collision, had a six degree list to starboard. The 'Virginian' had no list. The stem of the 'Virginian' struck across the stem of the 'Strathalbyn' at the 29-foot mark. Above that point, the stem of the 'Virginian' entered the port bow of the 'Strathalbyn.' Below that point, the stem did not enter the hull of the 'Strathalbyn,' but the starboard bow of the 'Virginian' moved, in contact, aft along the starboard bow of the 'Strathalbyn,' the fore-foot of each vessel passing by that of the other.

The lower structure of the 'Strathalbyn' being stronger than the upper and able to fend off to star-

board the 'Virginian,' whose stem and bow remained rigid throughout, the stem of the 'Virginian' above the 29-foot mark, as it entered the upper part of the 'Strathalbyn,' instead of following a prolongation of the line of approach and contact, was deflected through to the starboard bow of the 'Strathalbyn,' along a line corresponding to that of the latter's starboard bow, below the 29 foot mark. The stem of each vessel is practically perpendicular fore and aft—that is, with no overhang forward, so that there could have been no contact with the 'Strathalbyn's' port bow above the 29 foot mark before that had with the starboard bow below." (Apostles, pp. 1427-1428.)

The "Strathalbyn's" failure to port her helm and change her course to starboard in accordance with her three separate single blast whistles was clearly a violation of a statutory rule.

"But, when as in this case, a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was * * * a contributory cause of the disaster. In such a case the burden rests upon the ship of showing, not merely that her fault might not have been one of the causes, or that it probably was not, but that it could not have been. Such a rule is necessary to enforce obedience to the mandate of the statute."

The Pennsylvania, 19 Wall, 125, 136.

Yang Tsze Ins. Ass'n. vs. Furness, 215 Fed. 859.

The Thielbek, 218 Fed. 251.

"The signals in this article (28) are compulsory and not optional as in the corresponding article of previous regulations. The consequences of neglecting them, and of using them improperly do not seem to be yet fully appreciated by officers. Failure to comply with the article is an infringement of the regulations

carrying with it a presumption of liability for the collision.

* * * *

It may be worth while to quote some of the reasons which influenced the Conference (International Marine Conference held in Washington, October 16 to December 31, 1889) in framing the rule. In reply to the German delegate who argued that it is of no importance for the holding on vessel to know what the other vessel is doing since she herself is not at liberty to do anything before there is immediate danger, before the last minute, the British delegate said 'The learned delegate from Germany has asked, What is the advantage to the holding-on vessel? I venture to say that it is a very great advantage to the holding-on vessel to know that the other vessel is going to act; that she sees her. It comes to this: It says "I see you, I am going to keep out of your way." * * * I say that it is a very great advantage for a small vessel to know that the large steamer sees her and is taking proper steps to keep out of her way.' "

The Law Relating to the Rule of the Road at Sea, by David Wright Smith, pp. 252-3.

These single blasts blown by the "Strathalbyn" indicated to the "Virginian" that the vessel ahead of her which she could not see (The "Strathalbyn") could see her (The "Virginian"), knew her location and course and was directing her course to starboard, a maneuver which she was taking with reference to the "Virginian." *If the "Strathalbyn" had maneuvered, as she indicated she was doing, there would have been no collision.* These vessels collided, at the same angle and upon the same course which they had been approaching (Apostles, p. 889), that is head on or nearly so. The "Virginian's" course being SE $\frac{1}{4}$ S to SE $\frac{1}{2}$ S

(Apostles, p. 1157) and the "Strathalbyn's" course being NW½N (Apostles, p. 208), so the "Virginian" was probably slightly on the port bow of the "Strathalbyn." *If the "Strathalbyn" had ported ½ to 1 point at any one of the three times when she signaled the "Virginian," she would have passed clear to port.* We consider this as a grave fault on the part of the "Strathalbyn" and as being directly responsible for this collision.

"The Thames Rule, which is identical in language with the International Rule, is this, that if a signal is blown, either a port or a starboard helm signal, it indicates the direction in which the course of the ship is being altered and that only, and when one has got to deal with such rules, one has to remember that we cannot allow custom to come in between, though I am told that custom gives to the signal, not the meaning 'I am directing my course to starboard, or port,' but 'I am going to pass you port to port or starboard to starboard.' In this case the result of breaking that rule is this collision. * * * Therefore the view I take is this, that the Henry Morton is to blame for blowing a starboard helm signal and not starboarding, and she is to blame also because she had come into court with a story which, on the face of it, is an untrue one."

Cairn vs. Henry Morton, decision by Mr. Justice Bargrave Deane in Admiralty Division April 9, 1908, reported Shipping Gazette, cited in Smith's Law relating to Rule of the Road at Sea, p. 256.

(D) THE "STRATHALBYN" WAS AT FAULT
IN THAT SHE CARRIED NO RANGE
LIGHT.

We do not desire to take up very much of the court's time in discussing the fault of the "Strathalbyn" in not carrying range lights, as we are willing to rely upon the faults which we have already discussed, as showing primary gross fault on the part of the "Strathalbyn." Although it was alleged in the original libel that the "Strathalbyn's" "range lights" were properly set and burning, it was admitted by her officers that she carried no range light. She had regular electric range lights, but as she was using oil lights on the night of the collision, and probably expected to repair her dynamo within a short time, she did not go to the trouble of rigging a range light on her after mast. It is our contention that a heavily loaded vessel with a 6° list using temporary oil lights for the first time and knowing that during the course of the night she would have to navigate through the crowded and congested waters of Puget Sound in the path of numerous steamers, as a matter of precaution and good seamanship should have taken every precaution to render herself visible to approaching vessels by carrying an after range light.

While the Inland Rules applicable to the waters of Puget Sound do not absolutely require "seagoing vessels" to carry range light, they provide, Art. 2 (f) "all

steam vessels (except seagoing vessels and ferry boats) *shall* carry * * * a central range of two white lights; the after light being carried at an elevation at least fifteen feet above the light at the head of the vessel, etc.” Art 2 (c): “A seagoing steam vessel when under way *may* carry an additional white light similar in construction to the light mentioned in subdivision (a). These two lights shall be so placed in line with the keel that one shall be at least fifteen feet higher than the other, and in such a position with reference to each other that the lower light shall be forward of the upper one, etc.”

This last subdivision (c) of Art. 2 of the Inland Rules is an exact copy of subdivision (c) of Art. 2 of the International Rules which are applicable to all vessels navigating the high seas. With the exception that words “seagoing steam vessel” as it appears in the Inland Rules, the words “steam vessel” are used in the International Rules. In other words, the International Rules provide that steam vessels *may* carry range lights, while the Inland Rules provide that *all steam vessels* (*except* seagoing vessels and ferry boats) *shall* carry range lights, and that such “seagoing vessels” *may* carry range lights. The above provision of the International Rules first appeared in the Rules adopted in 1890 by enactment of Congress; prior to that time the Rules provided that “seagoing steamships” when under way should carry a masthead light,

port side light and starboard side light *and no other*. It will be noted that the Rules of 1890 change the words "seagoing steamships" to "steam vessels," not limiting its application to "seagoing steamships," and that the words "and no other" are omitted, and clause (c) under Art. 2 added, providing that steam vessels *may* carry range lights. Under the rules in effect prior to the adoption of the Rules of 1890, the Supreme Court of the United States held in the case of *Belden vs. Chase*, 150 U. S. 674, that a "pleasure yacht" constructed for and adapted to ocean navigation, had been upon the ocean and had just been authorized to navigate for one year the waters of any ocean route, was an "ocean going steamer" within terms of the Rules then in effect (the collision having taken place in 1882 on the Hudson River), and also within terms of local rules adopted by supervising inspectors for navigation of the Hudson River, which provided:

"Rule 3. All ocean going steamers and steamers carrying sail, shall, when under way, carry * * * (a) at the foremast head, a bright white light," etc.

It will be noted that both the International Rules then in effect and local rules applicable to the Hudson River, provided that "ocean going steamers" shall carry two side lights, masthead light "*and no other*," leaving no option as to carrying range lights. Justice Brown, an eminent authority in Admiralty Cases, in a concurring opinion, held that the yacht was invested with a double character:

"First, as an ocean going steamer, and second as a coasting vessel, and that, when navigating the inland waters of the country, she was bound to conform to the usages of those waters."

We merely cite this case to show the significant changes in both the International Rules and the Inland Rules, and the undoubted reasons for such changes. Justice Brown states in this case, p. 704:

"Even admitting that ocean vessels when navigating inland waters are not *bound* to carry these range lights, *because it is not contemplated that they shall navigate these waters*, I am clearly of the opinion that yachts which ply chiefly between ports and places within the United States and upon the inland waters of the country, should carry them. It seems to *me an exceedingly dangerous practice * * * to permit vessels not carrying the lights appropriate to inland navigation to navigate the narrow waters of the country. Vessels navigating these waters are entitled to expect that other vessels which they meet are required to carry the same lights which they carry and any distinction in that particular in favor of yachts is liable to create uncertainty and confusion with regard to the character of the approaching vessel. * * **

If the case required it, I would even go further and say, as did the dissenting judge when this case was heard before the general term (34 Han. 571-577) that *ocean going steamers when navigating the inland waters of the country, and not under sail should carry the range lights provided by Rule seven.*".. (Italics ours.)

It is also to be noted that the Rules were changed shortly after the above collision, so as to *permit* the use of range lights upon ocean going steamers navigating inland waters. As stated by Justice Brown, it was not provided that ocean going vessels should use range

lights because it was not contemplated that they would navigate inland waters. The necessity for the use of such range lights when navigating inland waters is pointed out by Justice Brown, and the rules were changed so as to *permit* their use.

The reasons of the International Marine Conference (1899) in proposing this change in the rules to permit the use of range lights is shown in the following discussion of the delegates to said conference:

“PROTOCOL OF PROCEEDINGS, INTERNATIONAL MARINE CONFERENCE, 1899.
RANGE LIGHTS.

Captain Shackford (United States): “Some kind of a range light, in addition to the present mast-head light now carried by steamers, seems to be almost imperatively demanded. Under the present system, when a steamer’s mast-head and either side-light is visible, it is impossible to judge within an arc of at least nine points which direction the steamer is headed, and this difficulty is a great element of uncertainty in judging what course it is most prudent to take on first observing the lights of an approaching vessel, particularly in misty or hazy weather. I think this can not be disputed. (Page 227.)

With the addition of the range-light proposed, this arc of nine points is at once reduced to one point, or at most two points; and it appears to me that if this element of uncertainty can be reduced without adding any lights to the present system, as I claim can be done by this change, it would be of immense advantage to those in charge of steamers.”

Mr. Goodrich (United States): “In my judgment it is a better system of lights than the running side lights with the mast-head light, because the instant a vessel deflects from her course when she is lighted with range lights, that instant the observer upon the

approaching vessel can see that she has altered her course, and can see it instantly when the course has been deflected even a half point. Of course, that can be determined upon a vessel which is fitted with the mast-head light and the running side lights within possibly an angle of three or four or five or six points." (Page 228.)

Captain Mensing (Germany): "But one great advantage is left, and that is, that if these range lights are seen right ahead and are heading for us, we see at once, unmistakably, what that other ship is doing—whether she has ported or starboarded. We see at a glance and we get that in our minds without any effort. We know that the ship is going just that way, and if we want to get out of her way we do a certain thing. This is a great advantage, and it is an advantage worth thinking about.

Therefore the committee have recommended that such a system should be permitted for the optional use of steamers." (Page 232.)

Captain Shackford (United States): "I have nothing to add to my argument in favor of this light; but I hold firmly to the opinion, after twenty years' experience as watch officer and master to the Atlantic trade, that some method could and ought to be adopted by which the approximate course a steamer is heading could be seen at a glance, certainly much nearer than the eight or nine points of the present system. In steamers going in opposite directions in misty or hazy weather, where lights can be seen only a short distance, every steamship master knows that the interval from the time when the mast-head light of an approaching steamer is first sighted, on either bow, to the time when side lights are first seen, is an exceedingly anxious one. He can only keep his course until the side lights come into view, and then, if it is a steamer crossing, it may be too late to avoid collision." (Pages 280-281.)

Mr. Goodrich (United States): "In the present system, as every one of us knows, there is an arc of ten

points in which no one can say where the sailing vessel is, or in which direction she is heading." (Page 371.)

EXTRACT FROM REPORT OF COMMITTEE ON LIGHTS

The greatest advantage of the above system (range lights) in the opinion of the committee, is that a small change in the course of a steamer approaching end on, or nearly so, is at once and unmistakably indicated.

CONCLUSIONS: Range lights if properly placed and fitted indicate under certain circumstances a ship's course in a more accurate way than at present. This is of some advantage, and therefore in the opinion of the committee the optional introduction of some such system may be proposed for the favorable consideration of the Conference. (Volume III, page 74.)"

In the case of "*The Conoho*," 24 Fed. 758, decided under the old rules where "ocean going vessels" were prohibited from using range lights, the court, in commenting on the failure of a coasting vessel, which by the rules was required to carry range lights, says at page 760:

"The rule for inland waters and narrow channels differs in one respect from that of *open waters*. It not only requires the two colored side lights, but it requires the two white range lights to be up and burning. The red and white side lights only show in what *general direction* the steamer is going; they do not show with accuracy *the course* held by the steamer moving in that general direction. In narrow waters, it is necessary to safety that this *course* shall be known; and the high light aft, and the lower light forward, fixed on a range with the center of the vessel, as required by Rule 7, shows this course. These two sorts of lights are probably more important in narrow channels than the red and white lights. They are both essential. It is for this reason that every steamer navigating narrow waters at night is required to have these lights up. If

a steamer has them not, it is in fault; it is *grossly* in fault. It takes the risk and responsibility of whatever may happen when they are not up. * * * There can be no *safe* navigation of our inland waters by steamers at night unless the *master of each steamer knows* that these lights are up at every moment while he is in motion."

The comments of the court in the above case as to the necessity of using range lights in inland waters, and the reason therefor, are even *more* applicable to *large* "ocean going steamers" than to small inland steamers. These range lights are required by law to be visible for a distance of at least five miles, and as stated by the court in "*The Conoho*," they are so fixed that they give accurate and definite information to an approaching steamer of her *exact course*, while the side lights are only required to be visible for two miles, and at that distance only indicate the "general course" of the vessel carrying such lights. Of course, no such information is conveyed by a single masthead light. In close, restricted waters, where vessels navigate close to thickly inhabited shores, which are covered with white shore lights from farm houses and other habitations, it is practically an impossibility to pick out and to distinguish a single masthead light from these shore lights if they are anywhere near the same locality. Another fact which we desire to call to the court's attention is that Art. 11 of both the International and Inland Rules provides that a *vessel at anchor* shall carry forward "a white light in a lantern so constructed as to show a

clear, uniform and unbroken light visible all around the horizon at a distance of at least one mile." What is there is to distinguish the white anchor light from the single masthead light of a vessel under way?

Article 29 of the Inland Rules, being known as *Precautionary Rule*, provides:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of *any* precaution which may be required by the *ordinary practice of seamen* or by the *special circumstances of the case*."

The changes in the Rules authorizing the use of range lights by ocean going vessels was undoubtedly made for the very reason stated by Justice Brown in the case from which we have cited. It was not originally contemplated that oceangoing vessels would navigate inland waters, but when it was found as commerce advanced and inland ports were opened as commercial ports, and were being used by oceangoing vessels in foreign commerce, the rules were so changed as to permit "oceangoing vessels" to use these range lights, whenever it was necessary for them in the course of their voyage to navigate inland waters in going to and from such ports, and when such voyages require that oceangoing vessels navigate these inland waters for any distance, we submit that both under the "ordinary practice of seamen" and common prudence for the protection of inland vessels, as well as such

oceangoing vessels, they are required to carry range lights. The rule is optional until such necessity for their use arises, but when such necessity *does arise*, then under Art. 29, if not under Art. 2, the carrying of such lights is as imperative upon "oceangoing vessels" as it is upon "inland vessels," and the necessity for their use by large oceangoing vessels is even more imperative. If ever the necessity for the exercise of "ordinary practice of seamen" and common produce requiring the use of range lights, arises, it certainly arose in the case of the "Strathalbyn." At the time of leaving Tacoma prior to the collision, the "Strathalbyn" was heavily loaded with lumber, having aboard 3,000,000 feet, approximately one-third of which was on her forward and after decks, her forward deckload being some fourteen and a half feet high. She was lying very low in the water and had a 6° list to starboard. She presented a very deceptive appearance on the water and was mistaken by Captain Penfield of the "Indianapolis" for a sail boat. (Penfield Apostles, p. 984-985.) (Phillips, p. 1013.) Hofstetter thought it a tug boat. (Apostles, p. 613.) Her appearance was such that Captain Penfield after meeting her once and overtaking her once, expected that she would "butt" into some vessel. (Penfield, Apostles, p. 985.) (Phillips, p. 1015.)

Her electric lights were then out of commission on account of some trouble with her dynamo, and oil

lamps which have now gone practically out of use on large steamers, were brought into use on this night in the emergency. In view of the known fact that these lights had never been used before, and that at their best they were not equal in brilliancy to her electric lights, and the further fact that the vessel was deeply loaded and would have to travel some hundred miles in crowded inland waters, where it was known that she would meet or pass in the vicinity of numerous inland vessels, all using range lights, we submit that the master of the "Strathalbyn," as a matter of safety, prudence and good seamanship, was absolutely required by the Rules and by law to use *every precaution* to make his vessel as readily visible as possible, and that it was his absolute duty under such circumstances to have equipped his vessel with an after range light, and that his failure so to do is gross fault on the part of the "Strathalbyn."

The fault of the "Strathalbyn" in leaving the port of Tacoma at six o'clock at night on a voyage which she knew would carry her through the crowded waters of Puget Sound where she would meet numerous vessels, with dim auxiliary oil lights, with no range light whatever and with her side lights obscured by her deck cargo stanchions so that they could not be seen from ahead was the initial and proximate cause of this collision and without which fault the said collision would not have occurred.

Her grossly negligent navigation prior to said collision was also a proximate and contributing cause to this collision without which the said collision would not have occurred. If she had stopped and reversed when she received no answer to her first passing whistle or had given the "Virginian" a danger whistle at this time, the collision would not have occurred. If she had stopped and reversed when she received no answer to her second passing signal or had given the danger whistle at this time the collision would not have occurred. If she had stopped and reversed when she received no answer to her third passing signal this collision would not have occurred.

If she had navigated in accordance with her passing whistles by porting her helm she would have passed the "Virginian" in safety, port to port and this collision would not have occurred. These faults were all direct, proximate and contributing faults sufficient in themselves to account for this collision and the "Strathalbyn" is not permitted to escape liability by raising doubts as to the "Virginian's" navigation. Any doubts as to the "Virginian's" navigation or the contribution of her faults, if any, to the collision, should be resolved in her favor and in order to hold the "Virginian" for a contribution, it must clearly appear that she was guilty of faults, but for which the collision would not have happened.

The Thielbek, 218 Fed. 251.
The Kirnwood, 201, 201 Fed. 428.
The New York, 147 U. S. 72.
The Nacoochee, 137 U. S. 330.
The Ludvig Holberg, 157 U. S. 60.
The Umbria, 166 U. S. 404.
The Pallanza, 189 Fed. 43.
The Gerry, 161 Fed. 413, 419.

The recognized doctrine is thus stated by Mr. Justice Brown in *The Umbria*, 166 U. S. 404, 409:

"Indeed, so gross was the fault of the *Umbria* in this connection that we should unhesitatingly apply the rule laid down in *The City of New York*, * * 147 U. S. 72, 85, and *The Ludvig Holberg*, 157 U. S. 60, 71, that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision should be resolved in her favor."

The Victory, 168 U. S. 410, 423.
The North Point, 205 U. S. 963.

"The *Careb* was grossly in fault for so arranging her lights and sails that upon occasions (such as this) there would be a considerable field of obscuration on one or both sides of her stern. * * * The faults of the *Careb* being thus primary, obvious and unexcusable, the evidence to establish fault on the part of the *Iberia* must be clear and convincing in order to make out a case of apportionment."

The Iberia, 123 Fed. 865.
 (Circuit Court of Appeals, 2nd Circuit.)
The Protector, 217 Fed. 117, 121.

"The negligence of the *Willinocket* if not actually admitted is proved by such an overwhelming weight of testimony that it need not be considered on this appeal. The only question is, Did any fault on the part of the *Person* contribute to the collision? The faults of the *Willinocket* were so glaring, so numerous and so

fully do they account for the disaster that the court *should not be particularly astute in the endeavor to discover* some contributing fault on the part of the *Persian* committed at a time when unerrable judgment is not to be expected." (Italics ours.)

The Persian (C. C. A. 2nd Cir.), 224 Fed. 441.

II.

The "Virginian" was not guilty of any Contributing Fault.

(Assignments of Error 4, 5 and 6)

(a) The "Virginian" had been reversing approximately two minutes prior to the collision.

The court below held:

"On account of the general route of vessels at the point of collision, the signals exchanged between the "Strathalbyn" and the "Flyer" indicating a passage port to port and the signals given to the "Virginian" by the "Strathalbyn," the "Virginian" must have known approximately, the general position and course of the "Strathalbyn" and when those aboard her could not make out the "Strathalbyn" or see her lights, they should have reversed her engines not later than the second whistle. That she did so is testified to by witnesses for the "Virginian" with some detail.

The bell book in the engine room of the "Virginian" contains the following entries:

Starboard		Port	
O	7:57	O	7:57
MM	:58	MM	:58
O	:59	O	:59
V	8:09	V	8:09

Indicating (O) "stop," 7:57; (MM) "full speed astern," 7:58; (O) "stop" (reversing), 7:59; (V) "slow ahead," 8:09. The engine room log book of the "Virginian" contains the following:

Stop, 7:57; full astern, 7:58; stop, 7:59; ahead slow, 8:09; her collision with S. S. "Strathalbyn" at 7:58 P. M.

Article 28 of the Inland Water Rules provides:

"When vessels are in sight of one another, a steam vessel under way whose engines are going full speed astern shall indicate that fact by three short blasts on the whistle." (30 Stat. L. 102.)

The three whistles of the "Virginian" were not given until after the "Strathalbyn's" danger signal, less than a minute before the collision.

Captain Beecher, pilot of the "Strathalbyn," testifies:

'Q. When the "Virginian" and "Strathalbyn" came into collision, did you notice whether or not the "Virginian" was backing?

A. When he blew his three whistles in answer to my danger signal, I looked along the hull which was very plain, and I called attention that she was just beginning to back; the backwater was just getting back under his starboard quarter.'

Captain Crerar of the "Strathalbyn" also testifies:

'Q. Did you observe whether or not the "Virginian" was backing at the time you came into collision?

A. Just before she struck us Captain Beecher directed my attention to the wash of her water coming up.

Q. Where did that appear to be?

A. Around her stern.

Q. How far forward?

A. It did not get forward at all, but was just beginning to come up. Captain Beecher remarked: "He is just going astern now."'

It is therefore concluded that the engines of the "Virginian" were not reversed until less than a minute before the collision, and that she was clearly in fault for not reversing her engines sooner." (Apostles, pp. 1429-1430.)

We have cited the lower court's opinion in full on this point for the purpose of showing the character of the evidence and all the evidence upon which the

court bases its finding that the "Virginian's" engines were not reversed until *after* the second whistle from the "Strathalbyn," and not until less than a minute before the collision. A careful examination of all the evidence upon this point shows not only that the court's finding is directly contrary to all the *positive testimony* in the case (as well as the physical facts shown by this testimony), but also that the evidence cited by the court, considered in connection with the other evidence, disproves rather than sustains the court's finding.

Considering first the testimony of Captain Beecher to the effect that "when he blew his three whistles in answer to my danger signal, I looked along the hull which was very plain, and I called attention that she was just beginning to back; *the backwater was just getting under his starboard quarter,*" and of Captain Crerar:

"Just before she struck us Captain Beecher directed my attention to the wash of her water coming up. * * *

Q. How far forward?

A. It did not get forward at all, but *was just beginning to come up.*"

When it is remembered that the "Virginian" had been making 11 knots up to the time she heard the "Strathalbyn's" first passing whistle, and that her engines had been stopped for about one minute up to the time of hearing the "Strathalbyn's" second whistle, it

seems to us that the above testimony, if believed, proves conclusively that the "Virginian" had been reversing for some considerable time and that at the time testified to had practically, if not wholly, checked her forward motion. It is a simple matter of mechanics that the back water must have been moving forward faster than the vessel itself in order to get under the vessel's starboard quarter or forward of her stern *any distance whatever*. If a vessel is anchored or stationary in the water and reverses her engines, the throw of her propellers will cause the water to go forward of her stern immediately, but if the vessel has forward motion the throw of her propellers must be greater than her forward motion to allow the back water to come forward of her stern any distance. The vessel's forward motion would have to be practically checked before this back water could possibly go *any distance forward of her stern*. In fact, the common and only accurate way of determining when a vessel's headway has been checked is to note the position of the back water from her propellers—when this back water moves forward of the vessel's stern, it shows conclusively that the vessel's headway has been checked. Captain Clark W. Sprague, a master mariner of thirty-five years' experience, a pilot for eighteen years on Puget Sound and at the time of giving his testimony in this case the regular pilot of the Nippon Yusen Kaisha and Great Northern Railway (Apostles, p. 1365), testifying as an expert witness for claimant

and cross-libelant, testified on page 1368 of the Apostles as follows:

“Q. And in getting that result of killing your headway, what would you do, Captain? * * *

A. Full speed astern *until the back water came up under the bridge and then the ship is dead.*”

This testimony was given in connection with the “Virginian’s” navigation, and not to expressly show that the back water coming forward to the ship’s bridge indicated that the vessel was stopped. This manifest proposition had not then been questioned. It had not occurred to us at that time that any other construction would or could be placed on this fact, which appeared to us perfectly clear.

Captain Duffy, pilot of the “Virginian,” testified as follows:

“Q. Captain, at the time of this collision did the “Virginian” have any forward movement?

* * *

A. I think she was about stopped.

Q. You think she was about stopped?

* * *

A. About stopped.

Q. What makes you think that?

A. The way they came apart. It was only a second when we seemed to come together and then went away again.

Q. Did you look over the side of the “Virginian” to see whether she was going forward through the water?

A. I could not tell. *The back water from the propellers was all the way forward of the bridge.*

Q. You could see the back water churned up—
(interrupted).

A. *Yes; away forward of the bridge.*

Q. Could you have seen that water if the "Virginian" had had any considerable headway on her?

* * *

A. No sir, I do not think so."

(Apostles, p. 1167.) (*Italics ours.*)

This was at the time of, or just prior to, the collision. If the back water was forward of the bridge, the "Virginian" must have been practically dead in the water, so she must have been reversing more than a minute. Captain Green, of the "Virginian," testified that he could stop the "Virginian" when fully loaded from full speed ahead in five minutes. That on the night of the collision with her light load he should judge that with the "Virginian" stopped one minute and reversing *two minutes*, she would be dead in the water (Apostles, p. 840). Certainly, it would take *more than one minute reversing* to stop her dead.

The "Virginian" is 492 feet long. At the time the "Strathalbyn" blew the danger whistle, the "Virginian" was 600 feet to 800 feet ahead (Apostles, p. 228). The "Virginian" immediately blew three blasts (Apostles, pp. 317, 836, 892, 1162). This is the time when Beecher and Crerar saw the back water coming up under the "Virginian's" starboard quarter. The vessels must have been at least 500 feet apart at this time—which, together with the "Virginian's" length of 492 feet and the distance from the "Strathalbyn's" bow to her bridge—140 feet—(Claimant's Exhibit "5-4"), makes a total distance of over 1,100 feet from where

the witnesses were standing to the "Virginian's" stern. When it is remembered that these vessels were approaching each other head on, or nearly so, and that it was exceedingly dark at the time, it becomes apparent that if these witnesses saw the back water from the "Virginian's" propeller at all, it must have been a considerable distance forward of her stern, which conclusively proves that the "Virginian" had been backing for a sufficient length of time to practically check all forward motion.

The Court below seems to infer from the fact that the "Virginian" did not blow the three whistles until after the "Strathalbyn" had blown the danger whistle, that the "Virginian" had not reversed until this time.

After quoting Article 28 of the Inland Rules, the Court below says:

"The three whistles of the "Virginian" were not given until after the "Strathalbyn's" danger signal, less than a minute before the collision." (Apostles, pp. 1429-30.)

And again at page 1432:

"Article 28 positively directs three whistles when a steam vessel under way whose engines are going full speed astern, when the vessels are in sight of each other. It does not forbid such signals under all circumstances unless the vessels are in sight of each other."

It is apparent that the Court is wrong in this construction.

The directions of the rule are mandatory. The whistles are only to be blown when vessels are *in sight* of each other. This article is similar to Article 28 of the International Rules. The purpose of the rule is to notify an approaching vessel "I see you and am reversing my engines full speed astern to avoid you." As was said by the British delegate at the Washington Conference, when this article was under discussion:

"It comes to this; it says, 'I see you; I am going to keep out of your way.'"

Smith's Law Relating to the Rule of the Road at Sea, p. 253.

"It may be noted that compliance with the rule is required when

1. The vessels are in sight of one another.
2. A steam vessel under way is taking a course.
3. Such course is authorized or required by these rules."

Marsden Collisions at Sea (6th Ed.), p. 468.

Spencer on Marine Collisions in discussing Article 28 of the International Rules of 1890, after comparing this rule with a somewhat similar rule adopted in 1885, states at page 184:

"The latter rule (1890) is *imperative* and requires vessels approaching to indicate their course by the use of the prescribed signals, when taking any course provided by the rules, *when in sight of each other*. This qualifying clause is to be taken in its usual sense,

meaning that they are to be used when vessels are sufficiently near each other to make the use of signals necessary to an understanding of each other's course. Passing signals, under the international rules, are only permissible when vessels are in sight of each other and cannot be used as a means of communication when they are not visible to one another. They are not to be used in a fog or other state of the atmosphere when sight is cut off. Their use is only permitted when there is absolute knowledge of the relative position of the vessels such as sight alone can convey."

In the case of *The Aurelia*, 183 Fed. 341, the Court cited the above quotation from Spencer on Marine Collisions with approval as applying to Article 28 of the Inland Rules:

"Counsel seek to avoid the force of this rule by urging that the words 'in sight of' in Article 28 of the act, mean within half a mile of, and that it is only when vessels are within half a mile of one another that a steam vessel under way, whose engines are going at full speed astern shall indicate that fact by three short blasts of the whistle. * * * Article 28 must be understood as it reads. No other interpretation is permissible (p. 344). The purpose of the statutory rule is to insure the highest degree of safety; and strict obedience to that rule construed precisely as it reads will eliminate accidents." (p. 345.)

See also *The Parthian*, 55 Fed. 426; 25 Am. & Eng. Ency. of Law (2nd Ed.), 965.

This very question as to whether a vessel should be permitted to blow three blasts of her whistles when her engines were going astern, when the approaching vessel was *not in sight*, was discussed at some length at the Washington Conference (1899) and such permission was rejected by a vote of 15 to 5. The discus-

sion in connection with this proposal shows clearly that it was *not* the intention that such signals (nor any passing signals) should be permitted unless the other vessel is *in sight*.

“Admiral Nares (Great Britain). Mr. President, the intention of the committee is this: Under Article 19 the signal has been made compulsory, provided a vessel does a certain action, provided she starboards, or ports, or goes full speed astern; but while Article 19 has been made compulsory, it is not to be allowed except when the other vessel is in sight. The committee want to go beyond that. They will not allow the starboard, or the port signal to be made to a vessel which is not in sight, but they see no reason why the signal ‘I am going full speed astern’ should not be made whether the other vessel is in sight or not. You have already, under Article 12, told the vessel to stop her engines. Whether that will include that she will stop altogether will depend upon the captain. Suppose the captain goes full speed astern instead of merely stopping his way; why should he not indicate that action to the other vessel which is not in sight? You have already given another signal: ‘You may feel your way past me with caution and I will stop by.’ So that it is all dove-tailed together.

Under Article 19 you have made it compulsory to give the signals for the port and the starboard tack. I think they can only be made when the vessel is in sight; but yet this third signal, I am going full speed astern, may be made. While I am speaking about this there is one alteration which has been made. I am not quite clear whether we had a discussion about it or not; but I think we did. I think that it came up in the Conference, that the term ‘I am’ was not definite and we have altered it to ‘my engines’ are going full speed astern. We have kept the three short blasts which have been in use for ages.

Captain Malmberg (Sweden). Mr. President, I am still of the opinion that section (e) ought not to come into the regulations, because if a steamer, accord-

ing to the first paragraph in this article, stops her engines and then goes astern, section (b) covers her situation as being stopped—no I am mistaken in that. However, I should not like to introduce into rules like these a manoeuvre to be made by a steamer not having the other vessel in sight, as the issue of such a manoeuvre may, in a fog, bring about a collision. The safest way in a fog is to lay the ship dead still and ascertain the position of the vessels in your vicinity. I still think that this subdivision (c) ought not to come into the article.

Captain Sampson (United States). Mr. President, I entirely agree with the last gentleman who has spoken. I think that some signal as provided in Article 19, to indicate that a vessel is going full speed astern, is very needful when two ships meet in a fog and approach each other to a point where they become visible. I think that signal would be a good one; but that case would be covered by Article 19. If the vessels are not in sight of each other it seems to me that no useful information can be conveyed by indicating that the ship is going full speed astern. That may be the direction to avoid a collision or it may be the direction to produce a collision.

THE PRESIDENT: Is the Conference ready for the question? The Secretary will please read section (c) again for the information of the Conference.

Section (c) is as follows:

‘(c) A steam vessel when her engines are going full speed astern, shall sound on her whistle three short blasts.’

The question was put to the Conference upon section (c) of Article 12, and the Chair being unable to decide, the yeas and nays were called for.

THE PRESIDENT: Five have voted in the affirmative and fifteen in the negative, so the paragraph is lost.”

To hold that a vessel is *permitted* to sound three blasts of her whistle to a vessel which she has *not* in sight, would destroy the very purpose for which the rule was adopted. It would mislead the other vessel

into the belief that she was "in sight" of the signaling steamer.

In the court below great stress was laid upon the entries as shown in the engine room log book of the "Virginian." These entries are quoted in the opinion of the court below, evidently for the purpose of sustaining the court's finding that the "Virginian" did not reverse until less than a minute before the collision. The court below quoted both from the bell book and the engine room log book. As it appears from the testimony that only one book was kept in the engine room, the entries in the so-called log book and bell book must of necessity be identical.

It appears from the testimony of Julius Schrag, oiler on the "Virginian," that he entered the time that the different bells were received in the engine room in a small memorandum log book (Apostles, p. 924). This memorandum book was then turned over to the chief engineer of the vessel who makes up the engineer's log and bell book from the entries contained in this memorandum book (Apostles, pp. 908-909). The entries in the bell book made by Schrag, the oiler, are as follows:

"Bell Book.			
Starboard		Port	
O	7:57	O	7:57
MM.....	:58	MM.....	:58
O	:59	O	:59
V	8:09	V	8:09

"O" indicating "stop," "MM" indicating "full speed astern" and "V" "slow ahead."

It appears from the testimony of this witness that these are the only entries made by him prior to the collision, *and that he did not enter in the memorandum log book in the engine room any entry as to the time of the collision with the "Strathalbyn"* (Apostles, p. 924), and an examination of this memorandum log (Libellant's Exhibit "T"), will show that this is correct.

The chief engineer took this memorandum log book from the engine room and made up the engineer's log, as follows:

Stop 7:57, full astern 7:58, stop 7:59, ahead slow 8:09.

In collision with S. S. "Strathalbyn" at 7:58 p. m.

This latter entry, as the time of the collision with the "Strathalbyn," was, therefore, *not made from any original record kept prior to or at the time of the collision.* It is shown that the "Virginian" *did reverse some time prior to the collision and that she was reversing at the time of the collision. This is admitted by the testimony of both Capt. Beecher, pilot of the "Strathalbyn," and Captain Crerar, master of the "Strathalbyn," who both testified that they saw the back water from the "Virginian's" propeller coming forward under the "Virginian's" starboard quarter at the time the "Virginian" blew her three whistles, which*

was at least half a minute before the collision. This entry as to the time of the collision was made at least 10 or 15 minutes after the collision had occurred. This must be true, irrespective of the positive testimony to that effect. The memorandum log book was kept in the engine room and when the shock of collision was felt in the engine room, the man in the engine room, of course, had no way of knowing with what vessel they had been in collision, or in fact, that they had actually been in a collision; not even the officers on the bridge knew what vessel had run into the "Virginian" (Apostles, p. 1163), until after the "Flyer" had come alongside, some 10 or 15 minutes after the collision.

The Court, by looking over the memorandum log book kept in the engine room (Libelant's Exhibit "T") will find that all of the entries were made on the full minute, no fractions of a minute being recorded. The testimony of Julius Schrag, the oiler, who kept this memorandum log book, shows that he went into the engine room at a quarter of eight, as he was required to report 15 minutes before going on duty, and that while waiting to go on duty, he made the entries in this book of the various bells as they were received; that he was standing underneath the ventilator, which is some 20 feet away from the desk in the engine room where this memorandum log book is kept, and that the clock from which the time is taken is some 7 or 8 feet back from this desk; that when he heard a bell from the bridge, he would walk over to the indicator

or telegraph to see what order had been received; that he would then walk back to this desk, pick up the memorandum log book and then walk out to where he could see the clock and make the entry (Apostles, pp. 919 and 920); that it would be from 35 to 40 seconds from the time he heard the bell before he would make the entry in the book (Apostles, p. 920). He further testified that he did not attempt to get or enter fractions of a minute in this log book, but would make the entries according to the nearest minute, as it appeared to him at the time of looking at the clock; that such an entry might be anywhere from 30 to 40 seconds from the actual position of the second hand of the clock, in other words, that an entry of 7:57 might be anywhere from 7:56½ to 7:57½; that an entry of 7:58 might be anywhere from 7:57½ to 7:58½, etc. (Apostles, pp. 922-23).

The "Virginian" at that time was on a voyage from Seattle to Tacoma. At the time these signals were heard, the man in the engine room supposed that the vessel was getting close to Tacoma, and that the signals were being given in connection with her navigation to make a landing (Apostles, p. 907). No particular attention was paid to the signals, nor was any effort made to get the entries on the exact second. The testimony of Schrag, the oiler, shows that when he heard the second signal from the bridge to the engine room, he walked over to the telegraph and saw that

it was indicating full speed astern; that he then walked from the telegraph back to the desk, picked up the engine room log and walked back again to where he could see the clock, and that he made the entry in the book the nearest minute, as appeared to him, that is, 7:58, which might be anywhere from 7:57½ to 7:58½, that he then walked back to the desk, replaced the book on the desk and walked back again to his original position alongside of the ventilator, and that he felt the shock of the collision as he was standing alongside of this ventilator. Very shortly afterward he heard, and in the same manner recorded, the signal to stop reversing, at 7:59 or thereabouts. In the light of this testimony as to the manner in which the engine room log was kept, the entries in the log are entirely consistent with the testimony of the officers on the bridge, as we will shortly point out.

That this is the usual method of keeping the engine room log is shown by the testimony of Henry Trippense, chief engineer of the "Virginian." (Apostles, pp. 917-8.) This is also clearly shown by the testimony of Albert W. McGougan, 4th engineer of the "Strathalbyn," who kept the "Strathalbyn's" engine room log on the night of the collision.

Q. Does your engine room clock show seconds as well as minutes.

A. It did.

Q. Do you record seconds when you make a record on the black board?

A. *Not after half a minute.*

Q. By some singular coincidence every signal you got that night, everything you recorded was on the exact minute.

A. That may be.

Q. Then you want us to understand that that might be a half minute or so from the exact time?

A. It certainly was not a half minute; it may have been under it, but not over it.

Q. *Well if it was more than 30 seconds past the minute, you would record it a minute ahead?*

A. *Yes sir, certainly.*

Q. *If it was less than 30 seconds past the minute you would record it on the minute back?*

A. *Yes sir.*

(Apostles, p. 382.) (Italics ours.)

That these engine room entries are not accurate is further shown by the "Strathalbyn's" log book, which shows "stop" at 7:34 and "collision" at 7:38, or a period of four minutes between the stop signal and the collision (Apostles, p. 371). As the "stop" signal was given *after* the "Strathalbyn" had blown her second whistle to the "Virginian" (being one minute after she had blown her first whistle) the entries in the engine room log of the "Strathalbyn" would indicate that *five minutes* elapsed between the "Strathalbyn's" first whistle to the "Virginian" and the collision, which is contrary to all the testimony in this case, the "Strathalbyn's" own officers testifying that from three to three and a half minutes elapsed from her first whistle to the "Virginian" and the collision. The physical facts, distances, speed of vessels, etc., clearly show that this time was less than 3 minutes.

When it is remembered that no entry of the time of the collision was made in the memorandum engine room log, but merely the time of stopping, reversing, and stop reversing, we submit that this engine room log, taken in connection with the undisputed testimony as to the usual method of keeping such logs does not sustain the Court's finding that the "Virginian" did not reverse until "less than a minute" before the collision.

In order to sustain such a finding the Court must discredit all of the positive testimony of the "Virginian's" officers and crew. It is always possible to make a mistake as to the exact time elapsing between certain whistles or orders given aboard ship but it is hardly possible to make a mistake as to whether such orders were given before or after hearing a whistle, or to make a mistake as to where a person was standing or what he was doing at the time of hearing such orders or what he did after hearing such order prior to hearing another whistle or order aboard ship. It is such testimony as this which conclusively establishes that the "Virginian" stopped her engines upon hearing the "Strathalbyn's" first whistle and reversed her engines prior to the "Strathalbyn's" second whistle and that she had been reversing at least two minutes prior to the collision. This is upon the theory that the "Strathalbyn's" estimate of three to three and a half minutes from her first whistle to the time of colli-

sion is correct. If, as we believe is clearly demonstrated, this time was only two minutes then the "Virginian" had been reversing two-thirds of this time.

The chief engineer of the "Virginian" testified that he was walking in the alley-way between the engine room and the after boat head; that he heard the first bell in the engine room, but supposing that they were near Tacoma, he paid no particular attention to it, it being the first assistant engineer's watch. Shortly thereafter he heard another bell, opened the door and stepped into the engine room and saw that the engines *at that time were going full speed astern*; that he stood there looking down in the engine room for *some little time*, and then heard four blasts of a whistle from some vessel, which was immediately answered by three blasts of the "Virginian's" whistle (Apostles, pp. 907, 908, 916). This testimony shows positively that the "Virginian's" engines were reversing at the time the "Strathalbyn" blew her danger signals, and that they had been reversing for some little time prior to the time her danger signals were blown. The testimony of this witness further shows that after he heard the four blasts of the "Strathalbyn," he walked down into the engine room to see that his engines were opened full, and that after trying them for that purpose, he walked back out of the engine room into the alleyway and up onto the "Virginian's" deck, and had walked 15 or 20 feet off when he felt the crash of the collision (Apostles, p. 908). This witness further

testified that, loaded light and making the same speed of 53 revolutions per minute, he could stop the "Virginian" in a little over a minute, and that his ship was stopped when the collision occurred (Apostles, p. 909). It thus appears from the testimony of the chief engineer and the oiler that the engines were reversed somewhere between 7:57½ and 7:58½, that the engines were stopped reversing somewhere between 7:58½ and 7:59½, and that the collision occurred some little time after the engines were reversed, and shortly before the engines were stopped reversing. In other words, that the collision occurred just prior to the entry of 7:59, which might be 7:58½ to 7:59½, but that no entry was made in this memorandum log book at the time the collision occurred, and that afterwards the chief engineer, in making up the engineer's log from this memorandum log book, noted that the collision had occurred at 7:58, or in other words, that the collision had occurred between the time of reversing and the time of stopping reversing. His testimony clearly shows that the collision occurred closer to the time of "stopping reversing" than it did to the time of "reversing." The testimony of the officers on the bridge shows that the collision occurred about 7:59½, which is entirely consistent with the testimony of the engine room crew.

The positive testimony of the officers on the bridge of the "Virginian" shows that she had been reversing at least two minutes prior to the collision. Captain

Green, master of the "Virginian," testified that the "Flyer" passed the "Virginian" when she was abeam of Pully Point at 7:53. That he went below at this time (Captain Duffy, the pilot, being in charge), and remained below three minutes when he heard the telegraph from the bridge to the engine room, which would be at 7:56. This was the order to stop the engines. He went on deck immediately and had been on deck talking to the third officer about one-half minute when Pilot Duffy ordered the engines reversed.

Q. When with reference to your coming upon the bridge, was the signal given your ship to go full speed astern?

A. Well, I can only judge by walking—coming up, walking across the bridge; I walked across the bridge and asked the officer what was the trouble, and then walked to the starboard side, and when I got over there, why the pilot had said: "Full speed astern." Well I should think it would not take more than thirty seconds anyhow, at the most.

* * *

Q. How long was your ship going astern before the collision occurred according to your best judgment?

A. I should think about two minutes.

(Apostles, pp. 839-40.)

This would be about 7:57 which coincides with the engine room record. That a minute and a half to two minutes later he heard four blasts from ahead which he immediately answered with three blasts. This would be 7:58½ to 7:59. The collision occurred less than a minute thereafter or between 7:59½ and 8 o'clock.

John D. McLeod, third officer on watch, testified that the "Virginian" stopped at the time of hearing the "Strathalbyn's" first whistle, that she reversed at the second whistle a minute later, that she was going full speed astern when the "Strathalbyn" blew the danger whistle and had been reversing at least two minutes prior to the collision. (Apostles, pp. 891-892-898-299.)

John Shuri, helmsman, testified that about three minutes after the "Flyer" had passed ahead (which would be between 7:56 and 7:57), the engines of the "Virginian" were stopped—about a minute later they were reversed; *that about a minute after the engines were reversed, he heard four blasts ahead* and that about two minutes later the collision occurred. By the wheel house clock the collision occurred at 7:59 (Apostles, pp. 902-3). Captain Duffy, pilot of the "Virginian," testified that he stopped his engines upon hearing the "Strathalbyn's" first whistle (that is first whistle after the "Flyer" had answered the whistle to her), and that he ordered his engines full speed astern *before the "Strathalbyn" blew her second whistle*, that this was about one-half minute after he had stopped his engines (Apostles, pp. 1160-61). *That about a minute after he had reversed his engines he heard the "Strathalbyn's" danger whistle*, which was answered by three whistles and that about one-half minute after the "Virginian" blew the danger whistle the collision occurred (Apostles, p. 1162).

There is one other fact which we desire to call to the Court's attention in this connection and that is the speed of these vessels at the time of contact. The witnesses for the "Strathalbyn" testify that she was practically stopped at the time of collision, while the witnesses for the "Virginian" testify that she was stopped at the time of the collision. As a matter of fact neither vessel had much headway at the moment of impact.

Captain Green testified that the vessels parted instantly (Apostles, pp. 837, 857). Miguel, the lookout, says they separated "as soon as they came together." (Apostles, p. 871.) McLeod, third officer, says: "We went right away from her, we were not together any time at all to speak of." (Apostles, p. 892.) Captain Duffy, the pilot, says: "We were not together over a few seconds and we backed off about three or four hundred feet." (Apostles, p. 1163.) Captain Beecher of the "Strathalbyn" says: "They were together about a minute." (Apostles, p. 218.) Mr. D. W. Dickie, an expert witness called by the "Strathalbyn," testified:

"From ships of the size of the 'Strathalbyn' and of the same metacentric weight approximately, I took the date that the period of roll of the 'Strathalbyn' would be about 20 seconds, and as the length of the damage on the 'Strathalbyn' is about 32 feet, I am led to believe that the speed which the 'Virginian' was traveling was about one knot an hour." (Apostles, p. 765.)

And again:

"What I figured out was that the speed of the 'Virginian' must have been about .95 of a knot to correspond to a period of roll of 20 seconds for the 'Strathalbyn.' " (Apostles, p. 772.)

This is upon the theory that the "Strathalbyn" was dead in the water—in other words that the combined speed of the two vessels at the time of contact was .95 of a knot.

The testimony of the "Starthalbyn's" own witnesses shows that the "Strathalbyn" was *not* stopped at the time of collision. Captain Crerar, of the "Strathalbyn," testified that his vessel, loaded as she was on the night of the collision, would keep her forward motion for about one-half mile or a period of ten minutes with her engines stopped but not reversed (Apostles, p. 262). On the night of the collision it is claimed her engines had been stopped for a minute to a minute and a half and were reversing less than a minute prior to the collision. Certainly, she could not have stopped her forward motion prior to the collision. That she did have forward motion is admitted by the lookout on the "Strathalbyn."

Q. You were still going ahead all the time?

A. We were going ahead but I don't think we moved much at that time (time of last whistle) (Apostles, p. 319).

In fact it was only claimed in the libellant's pleadings that the "Strathalbyn" was "practically stationary at the time of the collision" (Apostles, p. 17).

The testimony of C. P. M. Jack, surveyor for the "Strathalbyn," who surveyed the "Strathalbyn" after the collision and superintended her repairs was:

"I judge that the actual time expired between the time that the stem of the "Virginian" entered the "Strathalbyn" and the time when she cleared, or when she finished the cut, could not be more than a second or, at the outside, two." (Apostles, p. 429.)

This, together with the testimony of the "Virginian's" chief engineer, that the "Virginian" stopped reversing right after the collision, at which time she had backed away 300 feet or more, shows conclusively that she had stopped or practically so prior to the collision and must have been reversing *over one minute prior to the collision*. As we have shown above, the estimates of the various witnesses as to the time elapsing between the various whistles is probably exaggerated. This is only natural at such a time. This testimony conclusively demonstrates:

(1) That the "Virginian" stopped upon hearing the "Strathalbyn's" first whistle.

(2) That the "Virginian" reversed *prior* to hearing the "Strathalbyn's" second whistle.

(3) That the "Virginian" was reversing at the time she heard the "Strathalbyn's" danger whistle, and had been reversing for some time prior thereto.

(4) That the "Virginian" had been reversing for some time prior to blowing her three blasts.

(5) That the "Virginian" had been reversing for a sufficient time prior to the collision to check *all* her forward motion.

Certainly she could not be required to do more than this.

(B) THE "VIRGINIAN" WAS NOT REQUIRED TO REVERSE UNTIL DANGER OF COLLISION WAS APPARENT, AND IF SHE WAS AT FAULT FOR NOT REVERSING SOONER SUCH ERROR WAS *IN EXTREMIS*.

The Court below did not give any grounds for its finding that the "Virginian's" "failure" to reverse sooner was a fault, nor did it find such "failure" to be a contributing fault.

A vessel is only required to stop and reverse when the danger of collision is either apparent or from the close proximity of the vessel is reasonably to be apprehended. There is no express rule requiring a vessel to reverse under the circumstances as disclosed by the testimony in this case. The requirement of stopping and reversing would be a matter of seamanship under Article 29.

The rule is stated in Spencer on Marine Collisions, page 195:

"It may be stated as a general rule that there is no obligation on the part of a steamer to slacken her speed on meeting another whose course and position are known, where there is plenty of room for passage,

when a mere change of the helm is sufficient to put them on courses where collision is impossible."

"The rule is equally clear that where there is doubt or uncertainty as to the position or course of an approaching steamer, *the one observing* should slacken speed until all uncertainty is settled, when there is any reason to apprehend danger."

In the case at bar the "Strathalbyn" had signaled to the "Virginian" with a single blast of her whistle, which under the rules indicated to the "Virginian" that the "Strathalbyn" could *see her* and was changing her course to starboard for the purpose of passing the "Virginian" to port. The "Virginian's" refusal to answer this signal indicated, in the only way permitted by the rules, to the "Strathalbyn" that she, the "Virginian," could not see the "Strathalbyn." The "Strathalbyn" again signaled the "Virginian" with another single blast indicating that she could see the "Virginian" and was again changing her course to pass the "Virginian" port to port. The "Virginian" knew from these signals that the "Strathalbyn" could see her, was changing her ("Strathalbyn's") *course* to starboard with the *intention* of passing the "Virginian" to port and that she considered this maneuver safe, else she would not have repeated her intention after her knowledge that the "Virginian" could not see her. Was there anything in this situation to indicate danger of collision to the "Virginian?" She certainly had a right to assume that if there was any danger in the situation the "Strathalbyn" who had full

knowledge of the situation by *actual sight* of the "Virginian," would indicate such danger to her. In the absence of such signal she had no reason to apprehend danger.

As was said by the later Justice Lurton in the case of *Lake Erie Transportation Co. vs. Gilchrist Transportation Co.*, 142 Fed. 89 (Circuit Court of Appeals, 6th Circuit), at page 96:

"This direction to check, stop or reverse when two vessels are proceeding upon a course which involves risk of collision manifestly does not apply to a situation which is perfectly safe if no departure is made from settled principles of navigation, whether imposed by statute or custom." Britt. M. R. in the case of the *Beryh*, L. R. A. P. Div., 137, 139, very sensibly says of this requirement:

"That it is an instruction as to the conduct of men, and it cannot be that they are to do that thing merely because it is proved afterwards that there was risk of collision, or if there was risk of collision about to be constituted. It must apply if the circumstances are such that an officer of ordinary skill and care would be bound to come to the conclusion that if the ships continue to approach each other there will be risk of collision.

The object of the rule is to avoid risk of collision and we are not to be understood that a vessel is under no duty of obeying the rule in respect to vessels meeting and on, so as to involve risk of collision until the risk of collision has actually arisen. What we mean to say is that the rule applies *whenever it is or ought to be apparent that there will be risk of collision if nothing is done to prevent it*. But under the situation here the rule did not apply until the *Mack* began to depart from her duty and disregard her obligation. Only when this became or ought to have become apparent would a reasonably prudent navigator be charged with notice of risk of collision. As was said

in the case of *The Victory* and *The Plymothian* (68 U. S. 410 XV), the question as to whether the *Rome* may not have been slightly in fault may be a close question. This is often so when subsequent knowledge of what might have prevented disaster tends to qualify the enquiry as to the prior duty to avoid it. But it is not enough to raise a close question as to whether the *Rome* may not have been a few seconds slow in realizing that the *Mack* was not doing what she had every reason for assuming she would do. The fault of the *Mack* being established beyond cavil she is not entitled to divide damages with the *Rome* upon criticism of her management except upon clear proof of some fault not made *in extremis* and reasonable doubts should be resolved in her favor. *The Atlantic*, 119 Fed. 568 * * * *The New York*, 147 U. S. 72.
* * *

It was not until such time as the *Rome* ought to have discovered that the *Mack* was coming so near her own course as to probably involve risk of collision that she was under any obligation to apprehend danger and take measures to avoid collision. *The Servia*, 149 U. S. 144, 153 * * *."

The "Virginian" had a right to assume that the "Strathalbyn" would obey the rules and change her course to starboard, in accordance with her whistles, and it was only when the vessels were in the jaws of the collision that she discovered that the "Strathalbyn" was not obeying the rules.

Marsden on Collisions at Sea (6th Ed.), p. 325.
The Victory, 168 U. S. 410.
The Gerry, 161 Fed. 413.

Where the fault of one ship has placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something

wrong and has not been maneuvered with perfect skill and presence of mind.

- The Favorita*, 18 Wall. 598, 603.
The Blue Jacket, 144 U. S. 371, 392.
The Bywell Castle, 4 Prob. Div. 219.
The Ludvig Holberg, 157 U. S. 60.
The E. A. Packer, 49 Fed. 98.
The Havana, 54 Fed. 411.
Maurice B. Grover, 92 Fed. 678.
Transfer No. 8, 96 Fed. 253.
The Maverick, 84 Fed. 906, 909.

“It is the duty of the Court, as far as possible to place itself in the position of the master and to endeavor to interpret the rules of navigation in the light of the perils and perplexities which surround him at the time, the impending danger, the excitement of the moment, the necessity for immediate action. When a navigator of experience and good judgment acts, in such circumstances, his actions, if within the limits of reasonable judgment and discretion cannot be imputed to his vessel as a fault. If he acts upon his best judgment at the time it is sufficient, even though subsequent, judicial investigation may show that he might have chosen a more prudent course. A master who the next moment may be sinking with his ship and crew cannot be expected to display the utmost coolness and deliberation. *The Dimock*, 77 Fed. 226; *The City of Augusta*, 80 Fed. 297; *The Iron Chief*, 63 Fed. 289; *The Havana*, 54 Fed. 411; *The Robert Healey*, 51 Fed. 462.

The Queen Elizabeth, 122 Fed. 406, 409.

“The cause for such collisions as this must generally be sought for at a time prior to a few moments immediately preceding the impact. After the vessels are in close proximity, either or both, in the stress of sudden danger, may adopt an unwise and imprudent course. *The question is, Who is to blame for bringing*

the vessels into a position where cool calculation is impossible?

* * *

The Vulcan must be judged not in the light of the facts as they now appear, but in the light of the facts as they appeared to her master and mate as they stood upon her pilot house on the morning in question. The conduct of the tug was surely sufficient to puzzle the most accomplished and prudent mariner and the Court is convinced that The Vulcan did everything which was possible in the circumstances to prevent the collision. The City of New York, 147 U. S. 72." (Italics ours.)

The Genevieve, 96 Fed. 859, 860, 864.

In the case at bar there is no dispute but that the "Virginian" executed the proper maneuver in stopping and reversing. The only question is, did she stop and reverse at the proper time? The testimony shows that from the time the "Strathalbyn" blew her first whistle to the "Virginian" until the impact of collision, 2½ to 3 minutes had elapsed (we have shown this to be not over 2 minutes), the vessels at the time of the first whistle being from one-quarter to one-half mile apart. The court below found this time to have been "three minutes or more" before the collision. (Apostles, p. 1415.) As we have heretofore shown, this time could not have been over two minutes. In cases of peril, it is impossible to ascertain the exact time of the happening of events. The "Virginian's" officers testified that they stopped her engines at the first whistle—this is not disputed and is apparently accepted by the court below. During the ensuing period

between the first and second whistles of approximately one minute the pilot and mate were diligent in their search, both with the naked eye and their night glasses, to ascertain the location, by its lights or the loom, of the signaling vessel. It is their positive testimony that they reversed the "Virginian's" engines prior to the "Strathalbyn's" second whistle. The court found that they should have reversed her engines *at* the second whistle. We submit that the testimony conclusively proves that the "Virginian's" engines were reversed at least at the time of the "Strathalbyn's" second whistle. But even if not reversed at this time, we contend that the "Virginian" was not at fault. She was confronted with the unusual situation of hearing a whistle signal ahead of her from some vessel whose lights could not be seen. Whether it was a large steamer or a small sound steamer, whether it was close to her or at a considerable distance, she was unable to determine. This situation was brought about by the "Strathalbyn's" gross negligence. The officers of the "Virginian" were certainly entitled to a reasonable time to endeavor to locate the unknown vessel, and being unable to locate her to decide what was best to be done. From the time of this second whistle to the collision was not over two minutes, by the "Strathalbyn's" testimony. In all probability it was not over one to one and a half minutes. It is admitted that the "Virginian's" engines were reversing *at the time she blew her three whistles* in answer to the "Strathalbyn's" danger whistle, this being

from one-half to one minute prior to the collision. The "Virginian's" officers testify positively that she was reversing *at least a minute before* the danger signal was given, and had been going "full speed astern" at least two minutes before the collision. (Green, Apostles, p. 836-840; McLeod, Apostles, p. 892; Shuri, Apostles, p. 903; Duffy, Apostles, p. 1161-2, 1176-7.) We submit that it is conclusively proven by the positive testimony and the admissions of Beecher and Crerar as to seeing the "Virginian's" back water, that the "Virginian's" engines were reversed *prior to the sounding of the "Strathalbyn's" danger signal*, which reduces the period in dispute to less than one minute (probably *much less*.) We think that it is holding the "Virginian" to too strict a liability to hold that she is in fault for not reversing her engines one-half to one minute sooner than the court finds she did reverse and to hold that this in any way contributed to the collision.

"I may say that I believe in all these cases, where it is necessary to stop and reverse that instantaneous stopping and reversing, in compliance with Art. 18, the very instant there is danger of collision is not what is required. A man has to judge whether stopping and reversing is necessary, and he has also to judge whether any other rule applies. I do not think that a court of justice can say that a man has acted wrongly in not stopping and reversing instantaneously, some short time must be allowed."

The Emery Hass, 5 Asp. M. C. 216, 218.

In the above case Butt, J., was speaking of reversing in the face of *apparent* danger. In the case at bar

there was no apparent danger or reason to apprehend danger. In any view, the "primative and causative fault" was the "Strathalbyn's" lack of signal lights, her failure to navigate in accordance with her signals and her failure to stop and reverse when her first signal remained unanswered, and her failure to give the danger signal in time, and the fault of the "Virginian," if any, was a mere error of judgment at a moment of danger, which was brought about by the "Strathalbyn," and was not a contributing fault.

As was said by the court in the case of *Union S. S. Co. vs. Latz*, 223 Fed., at page 411:

"The *Gualala* as perhaps subject to criticism that she did not sooner stop and reverse, but the primary and causative fault lies with the Argyll, for which she is alone responsible."

The "Virginian" being in the "dark" as to the "Strathalbyn's" position, and the "Strathalbyn," being "master" of the situation by actual sight of the "Virginian," and having undertaken to control the situation by initiating signals, it was the imperative duty of the "Strathalbyn" to indicate danger by instantly sounding the danger signal, whenever she considered a collision probable. She was in a sense the *burdened* vessel, and the "Virginian" had a right to assume that she would give timely warning of any danger, as she knew the "Virginian" was not in a position to see the danger if it arose.

Article 20 of the Inland Rules provides:

“Where by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.”

Under Article 29, it was the “Strathalbyn’s” duty to navigate as the burdened vessel, and the “Virginian” was required to navigate so as not to embarrass the “Strathalbyn” in keeping out of her way. She was not required (and we think it doubtful if she was even permitted) to reverse her engines until danger was apparent, or should, from all the circumstances, have been apprehended.

The “Strathalbyn” had ample room for navigating and full knowledge of the course of the “Virginian,” and could and should not only have avoided the collision but even the risk of collision.

The Columbia, 174 Fed. 203.

The “Virginian,” under the circumstances, had a right to depend upon the “Strathalbyn” to signify danger, if there was apparent risk of a collision, and was not required to reverse her engines until the “Strathalbyn” gave her some indication of danger, or she discovered the danger herself. The absence of any danger signals from the “Strathalbyn” and the repetition of the signals that that vessel was passing to port, were in reality, under the circumstances, assurances to the “Virginian” from the “Strathalbyn” that no danger existed, because, if danger existed, it must

necessarily have been apparent to the "Strathalbyn," and her duty to signal the fact was plain.

When we consider that by the "Strathalbyn's" own testimony the time elapsing from her second whistle to the collision was not over two to two and a half minutes—which is certainly in excess of the actual time by at least one minute—it becomes apparent that any fault or error committed by the "Virginian" at or after the time of the second whistle was an error *in extremis* for which she cannot be held at fault.

Peck vs. Sanderson, 17 How. 178.

The Free State, 91 U. S. 200.

Elizabeth Jones, 112 U. S. 544.

The Blue Jacket, 144 U. S. 371.

The Delaware, 161 U. S. 459.

The E. A. Packer, 49 Fed. 92.

The Byzwell Castle, 4 Prob. Div. 219.

In the case of *Peck vs. Sanderson* (supra), a steamer and sailing vessel, which carried no lights, came within 200 to 300 yards of each other before the steamer was able to see the sailing vessel, and it was held that any faults or errors committed by the steamer thereafter were "*in extremis*."

In the "*Free State*" supra., it was said:

"Subsequently, and when the vessels were within three hundred feet of each other, and probably within *three minutes* of time, the scow changed her course and practically ran down the bows of the steamer. Then there was risk of collision, but not until then. The steamer in this emergency did stop and reverse, but the time was too short, and the distance too small to prevent the catastrophe."

In the *Blue Jacket*, 144 U. S. 371, it was held that when the danger of collision became apparent *two and a half minutes* before the collision, that the vessels were then *in extremis*.

In the *Delaware*, 161 U. S. 459, the *Talisman* gave her second passing signal to the *Delaware* when the vessels were about *one-eighth of a mile apart*, there being no apparent danger of collision up to this time unless the *Delaware* refused to accept this signal. The court held that the vessels at this time were *in extremis*.

"The second whistle was given so late that the vessels were evidently *in extremis* before a reasonable time had elapsed in which to answer it. In any event there is too much doubt about the fault of the *Talisman* to justify us in apportioning the damages." (p. 470.)

In the case of the "*E. A. Packer*," 49 Fed. Rep. 92, Circuit Judge Wallace, on the subject of the *Wolverton's* fault, said:

"I understand the rule to be well established that in every case where a vessel, by her own negligence, or the breach of a statutory rule, places another in great peril, the latter will not be held guilty of negligence because at the last moment she did something that contributed to the collision, or omitted to do something that might have avoided it. It has often been held by the Supreme Court that a vessel, which by her own fault causes a sudden peril to another vessel, cannot impute to the other as a fault a measure taken, *in extremis*, although it was a wrong step, and but for it the collision would not have occurred; and that a mistake made in the agony of the collision is regarded as

an error for the vessel causing the peril is altogether responsible." *The Nichols*, 7 Wall. 656; *The Carroll*, 8 Wall. 302; *The City of Paris*, 9 Wall. 634; *The Lucille*, 15 Wall. 676; *The Favorita*, 18 Wall. 598; *The Falcon*, 19 Wall. 75; *The Sea Gull*, 23 Wall. 165. If this is the correct rule, it would seem that if the *Wolverton* was in fault for not reversing, or for porting, or for not starboarding, it was a fault committed in the throes of a collision, which not only does not exonerate the *Packer*, but does not subject the *Wolverton* to liability."

(Decision affirmed on appeal (14 U. S. App. 684), and an application to the Supreme Court for a writ of certiorari was afterwards denied without an opinion (154 U. S. 518).)

In the case of *The Ella B*, 19 Fed. Rep. 782, 794, the court said:

"It is not necessary to decide that he took the wisest and safest course, for the reason that he had not time or opportunity to enter into a nice calculation as to which of the dangers which confronted him was the least to be apprehended. He was placed in a position of extreme peril by the sudden and extraordinary action of the *Sage*. If, in such an exigency, attended as it must have been with excitement and apprehension, he failed to give the most judicious orders or take the wisest course, the failure cannot be imputed to him, but to the vessel which placed him in this hazardous predicament. The conclusion, therefore, reached is that the *Sage* is solely responsible for the accident."

The case of *The Bywell Castle*, 4 Prob. Div. 219, is cited with approval by the Supreme Court of the United States in *The Elizabeth Jones*, 112 U. S. 514, at page 526.

"The last case (*Bywell Castle*) is a well considered judgment by Lords Justice James, Brett and

Cotton in the Court of Appeals, and the rule there formulated is that 'where one ship has, by wrong maneuvers, placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been maneuvered with perfect skill and presence of mind.' "

In the case at bar the risk of collision was not apparent to the "Virginian" until a few seconds prior to the collision, at which time the vessels were certainly *in extremis*. The "Virginian" had no reason to apprehend danger as the "Strathalbyn" by her repeated passing signals had indicated that she was changing her course to port and would pass the "Virginian" in safety. There was nothing in this situation to compel the "Virginian" to stop and reverse.

"When you say that a man must stop and reverse, or I will say slacken his speed, in order to prevent risk of collision, it would be absurd to suppose that it would depend upon the mere fact that there was risk of collision, if the circumstances were such that he could not know there was risk of collision * * *. It is absurd to suppose that you could regulate their conduct, not with regard to what they can see but to what they cannot see."

The Beryl, 9 P. D. 137.

The "Virginian" was brought into a position of extreme peril, but the prior faults of the "Strathalbyn" in (1) not having proper signal lights, in (2) allowing her side lights to become obscured by her cargo stanchions, in (3) her faulty and negligent navigation prior to the collision and in (4) giving passing signals without altering her helm—and if the "Virginian" was

guilty of any fault or error, such fault was clearly committed *in extremis*.

Spencer on Marine Collision, p. 352.

III.

Fault cannot be predicated upon the "Virginian's" failure to blow the danger signal.

ASSIGNMENT OF ERROR 7 AND 8

(a) *The "Virginian" was prohibited by the rules and regulations applicable at the point of collision from blowing a danger signal unless she had the "Strathalbyn" in sight.*

Rule I of Article 18 of the Regulations for Inland Waters provides for passing signals for vessels approaching each other end on or nearly so.

Rule III of Article 18 is as follows:

"If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts—not less than four—of the steam whistle."

Rule V of Article 18 provides for whistles to be given by vessels approaching a bend or curve.

Rule VIII, Article 18, provides for signals to be given when vessels are running in the same direction.

Rule IX, Article 18, is as follows:

"The whistle signals provided in the rules under this article for steam vessels meeting, passing, or overtaking are never to be used except when steamers are in sight of each other and the course and position of each can be determined in the day time by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow or heavy rain storm, when vessels cannot so see each other, fog signals only must be given."

Rule I of the Pilot Rules, applicable to the Inland Waters of the Pacific Coast, is as follows:

"If, when steam vessels are approaching each other, either vessel fails to understand the course or intention of the other from any cause, the vessel so in doubt shall immediately signify the same by giving several short and rapid blasts—not less than four—of the steam whistle, the danger signal. Whenever the danger signal is given the engines of both steamers shall be stopped and backed until the headway of the steamers has been checked; nor shall the engines of either steamer be again started ahead until the steamers can safely pass each other and the proper signals for passing have been given, answered and understood."

Rule III of the Pilot Rules is as follows:

"The signal for passing by the blowing of the whistle shall be given and answered by pilots in compliance with these rules, not only when meeting head and head or nearly so, but at all times when the steam vessels are in sight of each other, when passing or meeting at a distance within half a mile of each other, and whether passing to starboard or port. The whistle signals provided in the rules for steam vessels meeting, passing or overtaking are never to be used except when steamers are in sight of each other and the course and position of each can be determined, in the day time by a sight of the vessel itself, or by night by seeing its signal lights. In fog, mist, falling snow or

heavy rain storms, when vessels cannot so see each other, fog signals only must be given."

Rule IX, Article 18, being practically identical with Rule III of the Pilot Rules, clearly provides that none of the signals provided for under Article 18 for vessels meeting, passing or overtaking are to be used except when the vessels are in sight of each other. If Rule III of the Inland Rules, being practically identical with Rule I of the Pilot Rules, applies to vessels *meeting, passing or overtaking*, then it is clear that the danger signal cannot be given except when vessels are in sight of each other. It seems to us equally clear that the word "approaching," used in Rule III of the Inland Rules and Rule I of the Pilot Rules, comes within the provisions of Rule IX of the Inland Rules of "vessels meeting, passing or overtaking." We cannot conceive of a position of two vessels approaching each other where they are not either meeting, passing or overtaking. If this is true, it is clear that the "Virginian" was prohibited by Rule IX of the Inland Rules from giving the "Strathalbyn" a danger signal. The lower court, however, held that Rule IX of the Inland Rules only applied to Rules III and VIII, which, if correct, sustains our contention that Rule IX prohibited the giving of a danger signal unless the approaching vessel could be seen. However, the court further held that the said rule did not prohibit the giving of the danger signals, as provided for in Rule III. The

lower court based its findings largely upon the following reasoning:

“If the prohibition of Rule IX extends to the danger signal provided for by Rule III, then the danger signal could never be used except when the vessels were in sight of each other and ‘the course and position of each could be determined,’ while Rule III makes the failure to understand the course or intention of the other vessel a prerequisite to using the danger signal. If the construction of Rule IX contended for was adopted no room would be left for the operation of Rule III, which depends upon the failure to ‘understand the course and intention of the other’ vessel, while Rule IX forbids signals except when the course and position of each can be determined.” (Apostles, p. 1433.)

We think that the reasoning of the court is clearly erroneous. As the name “danger signal” implies, this signal was provided for the express purpose of enabling one vessel to notify an approaching vessel of the apparent danger of collision, it implies an actual knowledge of the dangerous position. It is true that Rule IX forbids any signals except when the “course and position” of an approaching vessel can be determined by actual sight. Where the course and position of another vessel has been so determined by actual sight and such course and position are such that the first vessel is either in doubt as to the intention of the approaching vessel as to maintaining such course, and where the first vessel can see that if said course is maintained there is actual danger of collision, then she is required by Rule III to blow the danger signal to

signify to the approaching vessel her doubt as to the intention of such approaching vessel in maintaining this dangerous course, and for the further purpose of arriving at a complete understanding with such approaching vessel as to their respective courses in passing. The most common application of the danger signal is where two vessels are approaching each other and one vessel has initiated a passing agreement which has been accepted by the second vessel and the two vessels then understand that each vessel can see the other, and in this position one of the vessels notes that the approaching vessel is not navigating in accordance with the passing agreement. The first vessel knows the position of the approaching vessel by actual sight, she understands the course of the approaching vessel from her signal, but when she sees that the other vessel is apparently not navigating in accordance with her signal, she is left in doubt as to the approaching vessel's course; that is, whether the approaching vessel intends to continue to navigate contrary to the signal, or whether it is her intention to correct her navigation and navigate in accordance with the passing signal. In this position she blows a danger signal to indicate to the approaching vessel her doubt as to her intention, and to further indicate that in the opinion of the first vessel there is danger of collision unless the approaching vessel changes her course in accordance with the agreement.

This was the exact situation in the case of *Duluth S. S. Co. vs. Pittsburg S. S. Co.*, 180 Fed. 656. It was also the situation in the following cases:

The Volund, 181 Fed. 643.

The New York, 175 U. S. 187.

Albert Dumois, 177 U. S. 240.

The Strathleven, 213 Fed. 975.

Union S. S. Co. vs. Lutz, 223 Fed. 402.

The Acilia, 120 Fed. 455.

Lake Erie, etc., Co. vs. Gilchrist, 142 Fed. 89.

U. S. vs. Erie R. Co., 172 Fed. 50.

In each of these cases the course and position of the approaching vessel was determined by actual sight, while the intention of the approaching vessel as to maintaining such course or changing her course was a matter of doubt within the meaning of Rule III. Clearly, the reasoning of the lower court is erroneous. If, however, the reasoning of the lower court and its construction as to the application of this rule is correct, such construction is certainly contrary to the general understanding of navigators. The only testimony in this case as to the construction and application of these rules was given by Captain C. W. Sprague, a practical navigator of over thirty years' experience on the inland waters of Puget Sound. This witness was produced as an expert by claimant and upon cross-examination testified as follows:

"Q. Did it ever occur to you, Captain, that if the lights happened to be out on the vessel you are navigating, you might not know it? (which we think is exactly what happened on the "Strathalbyn," that is,

that her lights were either out or very dim and were obstructed by her cargo stanchions so that they could not be seen from the head, and that neither Captain Beecher, her pilot, nor her master knew these facts and that this did not occur to them until it was too late to avoid a collision).

A. Yes.

Q. And under those circumstances supposing the lights were out on the "Strathalbyn," wouldn't it have been the business of the "Virginian," when she didn't see them, as soon as possible to blow a danger whistle?

A. Well, I couldn't say that it would.

Q. Wouldn't you do it if you were in the "Virginian's" place?

A. No, I would not talk to a person which I could not address my conversation to," which is the construction placed on this rule by the navigating officers of the "Virginian."

If the court's construction of the application of the various rules under Article 18 is correct—that is, that the restriction as to actual "sight" contained in Rule IX, only applies to Rule 1 (we take it that the court in its opinion intended to say Rule I instead of Rule III) and VIII, and does not apply to Rule III—then the wording of these rules is very ambiguous, as the court's construction is directly contrary to the construction placed on these rules by competent mariners. We cannot believe that these rules are so loosely drawn; if it had been the intention to except Rule III from the restrictions of Rule IX, such exception would have been clearly stated in either Rule IX or Rule III.

It has taken five pages of a well considered opinion of the lower court to arrive at the conclusion that

the restrictions of Rule IX as to actual "sight" did not apply to Rule III, and that the signals provided for under Rule III should have been given by the "Virginian," even though she could not *see* either the "Strathalbyn" or her signal lights. If this rule admits of the serious doubts implied in the court's lengthy consideration of the same, how could it be expected that the navigating officers of a vessel in the agony of an impending collision should interpret the rule in the thorough manner in which the court below has considered it? This is especially true when the only testimony in this case shows that the court's construction is contrary to the usual construction placed on this rule by competent mariners. If these rules will admit of the construction placed upon them by the lower court, then certainly the rules are not sufficiently clear to penalize a vessel *in extremis* for her failure to understand and construe these rules in the same way as the lower court has construed them. By analogy to Article 28 of the International Rules, we think it perfectly clear that the lower court's construction is not the correct one. The International Rules do not contain or provide for any signal such as the so-called "Danger signal." They do contain, however, provisions for signals to indicate changes in courses to be blown by vessels approaching each other so as to involve risk of collision when such vessels are *in sight* of each other. They also contain a provision for signals of three blasts to indicate that a vessel's engines are reversing full speed

astern (Article 28). This latter signal of three blasts is as much a "danger whistle" as the signal provided for under Rule III, Article 18 of the Inland Rules, and is the only signal provided in the International Rules to indicate danger.

At the International Marine Conference of 1889, at which conference the present International Rules for the prevention of collisions at sea were framed, the proposal was made by the committee on sound signals that vessels in "fog or mist or falling snow" (not in sight of each other) should be required to indicate by three short blasts when their engines were going full speed astern. The discussion of the delegates in connection with this proposal is set out fully on pages 96-97 of this brief. This discussion as to the only danger signal permitted by the International Rules is instructive in construing danger signals provided by the Inland Rules, and we take the liberty of again quoting a portion of this discussion:

"Admiral Nares (Great Britain): Mr. President, the intention of the committee is this: Under Article 19 the signal has been made compulsory, provided a vessel does a certain action, provided she starboards, or ports, or goes full speed astern; but while Article 19 has been made compulsory, it is not to be allowed except when the other vessel is in sight. The committee want to go beyond that. They will not allow the starboard, or the port signal to be made to a vessel which is not in sight, but they see no reason why the signal, 'I am going full speed astern,' should not be made whether the other vessel is in sight or not. You have already, under Article 12, told the vessel to stop

her engines. Whether that will include that she will stop altogether will depend upon the captain. Suppose the captain goes full speed astern instead of merely stopping his way; why should he not indicate that action to the other vessel which is not in sight? You have already given him another signal: 'You may feel your way past me with caution and I will stop by.' So that it is all dove-tailed together.

Under Article 19 you have made it compulsory to give the signals for the port and the starboard tack. I think they can only be made when the vessel is in sight; but yet this third signal, 'I am going full speed astern,' may be made. While I am speaking about this there is one alteration which has been made. I am not quite clear whether we had a discussion about it or not; but I think we did. I think that it came up in the Conference, that the term 'I am' was not definite and we have altered it to 'my engines' are going full speed astern. We have kept the three short blasts which have been in use for ages.

Captain Malmberg (Sweden): Mr. President, I am still of the opinion that section (e) ought not to come into the regulations, because if a steamer, according to the first paragraph in this article, stops her engines and then goes astern, section (b) covers her situation as being stopped—no, I am mistaken in that. However, I should not like to introduce into rules like these a maneuver to be made by a steamer not having the other vessel in sight, as the issue of such a maneuver may, in a fog, bring about a collision. The safest way in a fog is to lay the ship dead still and ascertain the position of the vessels in your vicinity. I still think that this subdivision (e) ought not to come into the article.

Captain Sampson (United States): Mr. President, I entirely agree with the last gentleman who has spoken. I think that some signal as provided in Article 19, to indicate that a vessel is going full speed astern, is very needful when two ships meet in a fog and approach each other to a point where they become visible. I think that signal would be a good one; but that case would be covered by Article 19. If the vessels are not in sight of each other it seems to me that no useful informa-

tion can be conveyed by indicating that the ship is going full speed astern. That may be the direction to avoid a collision or it may be the direction to produce a collision.

THE PRESIDENT: Is the Conference ready for the question? The Secretary will please read section (e) again for the information of the Conference.

Section (e) is as follows:

‘(e) A steam vessel when her engines are going full speed astern, shall sound on her whistle three short blasts.’

The question was put to the Conference upon section (e) of Article 12, and the Chair being unable to decide, the yeas and nays were called for.

THE PRESIDENT: Five have voted in the affirmative and fifteen in the negative, so the paragraph is lost.”

If, in the opinion of the delegates to this Conference, it is unwise to permit the blowing of the three blast whistle provided in Article 28 of the International Rules, except when vessels are *in sight* of each other, then it must be equally unwise to permit the danger signal provided for in the Inland Rules to be blown except when the vessels are *in sight* of each other, and we submit that such a restriction was intended and provided for in Rule IX of Article 18 of the Inland Rules. The interpretation and construction of Rule III of Article 18 should be made in the light of the decision of the Conference on this point.

(b) THE “VIRGINIAN” WAS NOT IN DOUBT AS TO THE COURSE AND INTENTION OF THE “STRATHALBYN.”

It will be noted that Rule III, if applicable at all, only applies to cases where a vessel fails to understand

the course and intention of the approaching vessel. The "Virginian's" officers knew that there was a vessel somewhere ahead of them and assumed that such vessel was approaching. They knew from the whistles blown to them by the approaching vessel, that is, a single blast, that this vessel was changing her *course* to starboard, with the *intention* of passing her port to port. The lower court has found:

"On account of the general route of vessels at the point of collision, the signals exchanged between the "Strathalbyn" and "Flyer," indicating a passage port to port, and the signals given to the "Virginian" by the "Strathalbyn," the "Virginian" must have known approximately the general *position* and *course* of the "Strathalbyn." (Apostles, p. 1429.)

"It is shown that those navigating the 'Virginian' knew a vessel was *approaching* from ahead and that they knew the vessel's *intention* from her whistle was to pass the 'Virginian' port to port." (Apostles, p. 1432.)

The court then uses the following language:

"But, not being able to either see the approaching vessel or her lights, they could not understand her course."

This latter statement is directly contrary to the finding of the court above quoted from page 1429, and the same is erroneous, as the "Strathalbyn" had clearly indicated her course by blowing one whistle, which, under the Pilot Rules, indicated the intention of the "Strathalbyn" to direct her course to starboard.

"One short blast of the whistle signifies the intention of or assent to the steamer first giving the signal to direct course to own starboard."

Therefore, it is clear that the "Virginian" knew the *course* and *intention* of the "Strathalbyn." The only information which she did not possess was the exact position of the "Strathalbyn."

Rule III clearly does not apply to such a case, as it makes a doubt as to "course and intention" of the other vessel a prerequisite of blowing the danger signal. We therefore assert that the danger signal did not apply to the situation of the two vessels in the case at bar.

(c) FAULT CANNOT BE PREDICATED UPON FAILURE OF ONE VESSEL TO SOUND AN ALARM WHEN THE DEVELOPING DANGER IS NOT APPARENT TO IT BUT IS APPARENT TO THE APPROACHING VESSEL.

The rule is stated in Spencer on Marine Collisions, at page 190, as follows:

"It is the duty of a steamer to give warning signals to approaching vessels when it is in a situation involving danger, especially in such position that the danger threatened is of such a nature *as not to be observable by the approaching boat*" (*Italics ours.*)

The Blue Bonnet, 10 Fed. 150.

The Chicago, 61 Fed. 521.

In the case at bar, the "Strathalbyn" had had the "Virginian" in full sight for two miles or more, and after exchanging passing signals with the "Flyer" and when she was abeam of the "Flyer," had indicated to the "Virginian" by blowing her passing whistle that she had the "Virginian" in sight and that she, the "Strathalbyn," was changing her course to starboard for the purpose of passing the "Virginian." This blast was not answered by the "Virginian," which, under the rules above quoted, told the "Strathalbyn" in the only way permitted by the rules that she, the "Strathalbyn," could not be seen by the "Virginian." The "Strathalbyn" had heard the "Virginian" reply to the "Flyer's" whistle when the "Flyer" and "Virginian" were off of Pulley Point, so she knew there was someone aboard the "Virginian" attending to the signals. The "Strathalbyn" could not have been over (probably considerably less than) one-half a mile away at this time. The "Flyer" had heard and answered the "Strathalbyn's" signal at about this same distance away, so the "Strathalbyn" must have known that its whistle was heard by the "Virginian." (Apostles, p. 224.) So the only conclusion a competent officer aboard the "Strathalbyn" could have come to was that the "Virginian" had been unable to see the "Strathalbyn" or her signal lights; otherwise, they would have been compelled, under the rules, to promptly answer the signal. At this time the "Virginian" knew that

the "Strathalbyn" could see her and knew her movements and course by her signal and range lights, and, as stated above, she had signified that she could not see the "Strathalbyn." Thereafter, the "Strathalbyn" was master of the situation and was compelled to navigate with extreme caution. She had no right to bring the vessels into a dangerous situation, and if she considered that there was any danger, it was her positive duty to have indicated this danger to the "Virginian," who was in the dark, so to speak, as to the "Strathalbyn's" position. If the "Strathalbyn," with full knowledge of the situation, did not consider that there was danger, certainly the "Virginian," without knowledge as to the "Strathalbyn's" position, had no reason to apprehend danger.

Captain C. W. Sprague, the expert navigator produced by claimant, testified upon cross-examination as follows:

"Q. When you hear a whistle ahead and then another whistle ahead and then another whistle ahead—

A. I would stop my ship and kill her.

Q. You would not blow danger signals to indicate that you could not see that ship ahead?

A. No.

Q. To the man who was on her?

A. No.

Q. If the man who was on the ship ahead—

A. (Interrupting). I don't realize a danger which does not exist so far as my apprehension goes. I can't see this fellow."

(Apostles, p. 1389-90.)

And again:

“Q. Wouldn't you blow danger whistles if you were in doubt?

A. No, I don't think I would.

Q. Don't the rules require that when you are in doubt of the course or direction of another ship that you shall blow danger signals?

A. *If you know you are in danger.*

Q. But it does not say that, does it—if you know you are in danger—it says when you are in doubt of the course and direction of another ship, you should blow your whistles, doesn't it?

* * *

A. I don't blow a danger whistle until the impulse hits me that *such is the case.*

* * *

Q. I want to know if you are in doubt of the course and direction of a ship, if you, as a navigator, would blow danger signals?

A. *I can't blow a danger signal until it occurs to me that danger exists.*”

(Apostles, p. 1384.) (Italics ours.)

Mr. Smith, chief officer of the S. S. Daring, which passed the “Strathalbyn” prior to the collision, testified on cross-examination:

“Would that time come when he would begin to blow whistles if I considered that it was getting unsafe for the vessel that I was on by stopping her and backing her up, it would not be necessary for me to signify him as long as he did not consider he was in danger. If he would not consider that he was in any danger, or rather that I was by approaching him, why, he (I) would not be called upon to blow any whistle, would he (I)?” (Apostles, p. 1299.)

The testimony of the “Virginian's” officers was that when they heard a whistle from ahead (which was answered by the “Flyer”), it put them on the alert and they endeavored to pick up the object which had blown

this whistle. Not having been able to see any lights or any vessel ahead, that upon hearing another whistle, which was apparently for them, they immediately stopped the "Virginian's" engines and endeavored, with the aid of the naked eye and night glasses, to locate the approaching vessel. Not being able to do so, the engines were put full speed astern, at which time another whistle was heard from ahead. They continued to keep a sharp lookout and a minute or more later they heard four blasts and that up to the time of hearing these four blasts they had neither heard nor seen anything to indicate any danger.

"However that may be, all danger existing at any time from any cause was obvious to the *Townsend* at least as early and as clearly as to the *Moore*. As to the gradual drawing together of the boats on converging courses, the *Townsend* knew that she had not ported on the range intersection, while the *Moore* could not know this fact until the convergence became prominent. As to the sudden swing of the *Townsend's* stern at the moment when most dangerous, this could not be anticipated by the *Moore*. Hence, fault cannot be predicated on the *Moore's* failure to sound an alarm."

The Queen City, 189 Fed. 653, 660.

In the case at bar the "Virginian" had no means of knowing that the vessels were in dangerous proximity nor did she have any reason to anticipate danger; the "Strathalbyn" knew these facts by actual sight—she had not signified to the "Virginian" that there was danger and we submit that fault cannot be predicated on the "Virginian's" failure to blow the danger whistle.

It seems absurd to hold that the "Virginian" was required by Rule III of Article 18 to blow danger signals under these circumstances. As was said by the Master of the Rolls in *The Beryl*, 9 P. D. 137, 138, in speaking of the Regulations to prevent collisions at Sea:

"When you speak of rules which are to regulate the conduct of people, those rules can only apply to circumstances which must or ought to be known to the parties at the time; you cannot regulate the conduct of people as to *unknown circumstances*. When you instruct people, you instruct them as to what they ought to do, under circumstances which are or ought to be before them. When you say that a man must stop and reverse, or, I will say, slacken his speed, in order to prevent risk of collision, it would be absurd to suppose that it would depend upon the mere fact that there was risk of collision, *if the circumstances were such that he could not know there was risk of collision*. I put some instances during the argument to show that that was so. * * * How can you regulate their conduct if neither can see the other until they are close together? It is absurd to suppose that you could regulate their conduct, not with regard to what they can see, but to what they cannot see. Therefore the consideration *must always be in these cases, not whether the rule was in fact applicable, but were the circumstances such that it ought to have been present to the mind of the person in charge that it was applicable.*"

(d) THE DANGER SIGNAL WOULD NOT HAVE GIVEN THE "STRATHALBYN" ANY ADDITIONAL INFORMATION, AND THE FAILURE TO GIVE SUCH SIGNAL DID NOT IN ANY WAY CONTRIBUTE TO THE COLLISION.

It is elementary law that fault cannot be predicated on an error or even a breach of the statutory regulation which did not in any way contribute to the collision.

Straits of Dover, 120 Fed. p —

City of Washington, 92 U. S. 31.

The Yang Tsze, etc., Co. vs. Furness, etc., Co.,
215 Fed. 859, 863.

The "Strathalbyn" claimed in the court below that the "Virginian" should have blown the danger signal to the "Strathalbyn" to indicate to the "Strathalbyn" that her lights were not seen. It was for this sole purpose that it was claimed that the "Virginian" should have blown the danger signal. The "Virginian" had indicated to the "Strathalbyn" in the only way permitted or provided for in the rules and regulations that she could not see her lights nor the vessel itself; that is, by her refusal to answer the "Strathalbyn's" passing signal, which the lower court held she was correct in doing. (Apostles, p. 1434.) The "Strathalbyn" had the "Virginian" in full view, knew her exact location and could determine her exact course from the bearing of her signal lights. She knew from the "Vir-

ginian's" failure to answer her signals that the "Virginian" could not see the "Strathalbyn." The danger signal could not possibly have given the "Strathalbyn" any further or additional information.

"It cannot be said that the pilot of the *Crathorne* failed to understand the course or intention of the *Acilia* before he could make out that she was under a starboard helm, because he had a right to presume, until he received a signal of two blasts, that she was going to obey the statute and keep to her proper side of the channel. Therefore, it was not a fault that he did not blow danger signals. He blew one blast and that was not heard on the bridge of the *Acilia*, because of the sound of her own whistle, but even if danger signals could have been heard, it does not seem possible that they would have afforded any information to those on the *Acilia*. The pilot of the *Acilia* says he already knew there was danger when he had starboarded his helm and further that he could not shut off the *Acilia's* whistle and so could not give notice of the altered course he had entered upon. But the omission to give the danger signal, if indeed they ought, under the rule to have given it, is not sufficient to charge the *Crathorne* with fault, as it clearly appears that the omission in no way contributed to the disaster, as the pilot of the *Acilia* already knew all the danger signals could have conveyed to him."

The City of Washington, 92 U. S. 31, 37; 23 L. ed. 600.

"To put upon the *Crathorne* the responsibility for the failure of her pilot to do all that any navigator might possibly have done, if he had understood then what is understood now, after the unlooked for intention of the *Acilia's* pilot had been explained and the cause of the prolonged whistle had been discovered, is, as was said by Lord Esher, Master of the Rolls on the *Stephenotis* and the *Horton*, cited in *The Victory*, on page 428 of 168 U. S., 'requiring men to do

what no man ought to be expected to do under such circumstances.' ”

The Acilia, 120 Fed. 455, 460.

Nor did the failure of the “*Virginian*” to blow the danger whistle in any way contribute to this collision. The pilot of the “*Strathalbyn*” knew, when his first whistle remained unanswered, that there was danger, and this court must find, under the authority of *The New York*, 175 U. S. 187, and the *Duluth S. S. Co. vs. Pittsburg S. S. Co.*, 180 Fed. 656 (and cases there cited) that the “*Strathalbyn*” should have stopped and reversed not later than her second whistle. The court below held that the “*Virginian*” should have blown the danger signal at the time of hearing this second whistle. Even if the “*Virginian*” had blown the danger whistle at the time of hearing the “*Strathalbyn*’s” second whistle, what action could the “*Strathalbyn*” have taken which she was not already required to take? The “*Virginian*” should not be held to anticipate that the “*Strathalbyn*” would fail to act lawfully and certainly should not be required, in anticipation of such failure on the part of the “*Strathalbyn*” to take extreme methods, such as blowing the danger whistle, to warn the “*Strathalbyn*” to perform her duty, especially as the “*Virginian*” had no means of knowing that the “*Strathalbyn*” was not performing her duty, or that there was in fact any danger.

We submit that the failure of the "Virginian" to blow the danger signal, if a fault, did not in any way contribute to this collision.

IV.

DECREE OF LOWER COURT

Assignments of Error, 2, 3, 10, 11, 12, 13, 14, 15, 16.

(a) The "Virginian" should recover her entire damages.

The "Strathalbyn" was guilty of primary causative faults sufficient to fully account for the collision and the burden was on her to show that such faults were not the sole cause of this collision. This burden she has not sustained. It seems clear, therefore, that under the facts as disclosed by the testimony in this case, and the rules of law applicable thereto, the trial court erred in entering judgment against the appellant for one-half of the total damages. It being clearly established that the "Virginian" was not guilty of any contributing fault, she is entitled to recover her full damages from the "Strathalbyn."

"The fault of the launch is clear and manifest. It was the primary cause of the collision. The burden of proof rests upon those who contend that fault on the part of the tug also contributed to the disaster. That burden has not been sustained. It follows that the tug and scow must be held free from blame."

The Southern, 224 Fed. 210, 216.

City of New York, 147 U. S. 72.

The Umbria, 166 U. S. 404.

The Victory, 168 U. S. 423.

(b) The court erred in allowing either the "Strathalbyn" or the cargo owner any recovery against the "Virginian."

If the court finds that the "Strathalbyn" was guilty of primary causative faults sufficient to account for the collision and that the "Virginian" was not guilty of any contributory fault, then it follows that neither the "Strathalbyn" nor the cargo owner is entitled to any recovery against the "Virginian" or the stipulator on its release bond.

(c) The trial court erred in decreeing that the Strathalbyn Steamship Company, Ltd., as bailee of cargo, libellant in Cause 1052, recover from the American-Hawaiian Steamship Company, claimant, the full amount of its damage. The court also erred in decreeing that the Strathalbyn Steamship Company, Ltd., libellant in Cause 1036, recover from appellant one-half of its excess of damages over the damages sustained by the "Virginian," without a reduction therefrom of one-half the cargo damage.

In cases of mutual fault the rule as to division of damages is too well settled to admit of any doubt. The damages sustained by all parties are added into one amount and the party sustaining the largest amount of damage is entitled to recover one-half of its excess from the other party. This rule is stated in *The North Star*, 106 U. S. 17, as follows:

“According to the general maritime law, in cases of collision occurring by the fault of both parties, the entire damage to both ships is added together in one common mass and equally divided between them, and thereupon arises the liability of one party to pay the other such sum as is necessary to equalize the burden. This is a rule of mutual liability between the parties.”

See *The Chattahoochee*, 173 U. S. 540.

In the case at bar, the trial court found both vessels at fault and ordered that the damages be divided. In the consolidated causes the damages to be divided were those sustained by the “Strathalbyn” and its owners, by the “Virginian” and its owners and by the cargo owner. These damages should have been lumped in one sum and divided between the “Strathalbyn” and the “Virginian,” there being no question but what the cargo owner, under the decree of mutual fault, is entitled to its full damages. Upon this division of damages the “Strathalbyn” was entitled to a decree against the “Virginian” for one-half of its excess damages over the damages sustained by the “Virginian,” each party standing one-half of the cargo damage. In the decree entered by the trial court it will be noted that the cargo owner was allowed its full damages against the owners of the “Virginian” and that the “Strathalbyn” was allowed one-half of its excess damages against the owners of the “Virginian,” without any allowance or deduction therefrom by reason of the full amount of the cargo damage being allowed against the “Virginian.” It is true that the court,

by a peculiar provision in the decree, sought to prevent the Strathalbyn Steamship Company, Ltd., from levying immediate execution for the full amount decreed it by providing that execution should only issue, *now*, for the amount decreed it less one-half the cargo damage. This deduction, however, by the terms of the decree, only applies until the *filing of the mandate* of the appellate court. In other words, if this court should affirm the decision of the trial court immediately upon the filing of the mandate, the Strathalbyn Steamship Company, Ltd., would be entitled to execution for one-half of its excess damages without any deduction whatever because of the cargo damage, and the owner of the cargo would be entitled to immediate execution for the full amount of its damage against the "Virginian." The decree, as it now stands, makes the "Virginian" liable for the full amount of the cargo damage without any reduction from the amount awarded the "Strathalbyn" as one-half of its excess damages. In other words, it is liable for \$4,126.92 in excess of the liability of the "Strathalbyn." The only way the owners of the "Virginian" can prevent the payment of this excess liability is by paying the full amount of the cargo damage prior to the filing of the mandate of this court, in case the decree is affirmed. It might very well happen that the owners of the "Virginian" would require some little time to secure funds to satisfy this decree. Under the form of the

decree, if these funds were not secured immediately upon the filing of the mandate, then the owners of the "Virginian" would be liable to immediate execution, both by the Strathalbyn Steamship Company, Ltd., and by the cargo owner, and would necessarily be in the position of having to seek a recovery from the owners of the "Strathalbyn" of one-half of the cargo damage in a separate suit.

We submit that the form of decree is manifestly unjust and contrary to the rule as laid down in *The North Star*. Under the rule as laid down in that case, either the cargo damage should be divided between the parties, or, if the full amount of the cargo damage should be decreed against the "Virginian," the "Virginian" is entitled to a reduction *in the decree* of one-half of this cargo damage from the amount awarded to the "Strathalbyn."

(d) The court further erred in refusing to dismiss Cause 1052 and in allowing the Strathalbyn Steamship Company, Ltd., interest on its damages and costs, and in allowing the Strathalbyn Steamship Company, Ltd., as bailee of cargo, interest on its damages and costs.

In admiralty proceedings the allowance of costs is entirely within the discretion of the court, and the circumstances of each case must govern the court in the matter of awarding costs. This is also true as to the allowance of interest on damages.

“In admiralty, interest on claims arising out of breach of contract is a matter of right, but the allowance of interest on damages in cases of collision or other unliquidated damages is always in the discretion of the court and may be allowed or disallowed by the District Court.”

Benedict on Admiralty, p. 319.

Spencer on Marine Collisions, p. 381.

The Scotland, 118 U. S. 507.

The Albert Dumois, 177 U. S. 244.

The Itasca, 117 Fed. 892.

“Where substantial justice cannot be done without such allowance the courts uniformly allow it. Where such allowance would increase the damages beyond what appears just as between the parties, courts will decline to allow it.”

Spencer on Marine Collisions, p. 377.

It is true that an appellate court will not consider an appeal from the allowance of costs or interest by a lower court where this is the only question raised on the appeal, but such appellate courts will consider the allowance of interest and costs in considering an appeal from the entire decree of the lower court. In the case at bar the court found both vessels at fault and ordered that the damages be divided. However, upon the findings of the lower court, the faults found against the “Strathalbyn” were much more gross than the faults found against the “Virginian.” The court found the “Strathalbyn” primarily responsible for the collision, in that she did not have proper lights and in that such lights were obscured. It further found that this was the primary proximate cause of the collision. On the other hand, the only faults found against the “Vir-

ginian" were that she did not reverse as soon as she should have and that she failed to blow a danger signal. While we feel that it clearly appears from the testimony in this case and the law applicable thereto, that neither of the alleged faults on the part of the "Virginian" in any way contributed to this collision, still, if it could be held that such alleged faults were contributing faults, the same were mere errors of judgment at a time of extreme peril, brought about by the gross negligence of the "Strathalbyn," which, if not actually *in extremis*, were very nearly so.

The damages sustained by the "Strathalbyn" were largely in excess of the damages sustained by the "Virginian," as a result of which the "Virginian," by this decree, is made liable for approximately \$22,000 more than its own damages, which sum it must, under the decree, contribute to the "Strathalbyn." By an allowance of interest and costs to the "Strathalbyn," it would be required to pay a further sum of approximately \$5,000, which, under the decree, it must contribute to the "Strathalbyn." In other words, where its fault, if any, was slight, in comparison with the "Strathalbyn," under the form of the decree of the lower court it is required to pay the "Strathalbyn" in excess of its own damages the sum of approximately \$22,000, and if costs and interest are allowed approximately the sum of \$27,000.

We submit that if the equities of any case ever required that interest and costs should be disallowed, they should be disallowed in the case at bar, in case the decree is confirmed.

In connection with allowance of interest and costs of the cargo owner, we would call the court's attention to the pleadings in this case. The original libel in Cause 1036 expressly covered not only damage to the steamship "Strathalbyn," but also damage to the cargo aboard of her, which was expressly mentioned in paragraph V of said libel, the total amount of all damage being claimed at \$160,000. The owners of the "Virginian," in order to secure a release of the said vessel, were required to execute and file a release bond of \$175,000. Sometime subsequent to the filing of this original libel, the Strathalbyn Steamship Company, Ltd., appeared as bailee of cargo and filed another libel against the "Virginian," claiming damages to cargo in the sum of \$100,000, upon the filing of which libel the owners of the "Virginian" were required to execute and file another bond for the sum of \$110,000. At the time this second libel was filed, the claimant of the "Virginian," by motion setting out the facts as we have stated them above, asked that the libel in Cause 1052, which it alleged was an amplification of the relief sought in the libel of Cause 1036, be dismissed. The court, in passing upon this motion, held that this contention could be best determined when

the causes were heard upon their merits and that "the court can then make any order that the justice of the case may require."

The damages actually sustained by the "Strathalbyn" amounted to approximately \$100,000, and with interest and costs to approximately \$128,000. The damages sustained by the cargo amounted to approximately \$6,800, which, together with interest and costs, amounted to the sum of \$8,200, or a total damage of less than \$110,000, or, with interest and costs of less than \$140,000. There can be no question but that the allegations of the libelant in Cause 1036 are broad enough to cover damage to the cargo, and it is perfectly apparent that the bond filed in this cause for the sum of \$175,000 was more than ample to cover both damage to the steamer and her cargo.

We submit that the filing of the libel in Cause 1052 was entirely unnecessary, and that the American-Hawaiian Steamship Company should be allowed its costs and interest in said Cause 1052 as against the owner of the cargo, and that costs or interest should be disallowed to the said libelant. 1 *Corpus Juris*, p. 1357.

Under the facts as disclosed by the testimony in this case and the law applicable thereto, we respectfully submit that the steamship "Strathalbyn" was guilty of primary gross fault, which was fully sufficient to account for this collision and that she has not sustained

the burden of showing that her said faults were not the sole cause of said collision, but that, on the other hand, it is conclusively established that such faults were the sole cause of the collision; and that the steamship "Virginian" was not guilty of any fault whatever, or that if she was guilty of fault, such fault in no way contributed to this collision, and that, therefore, the libel of the Strathalbyn Steamship Company, Ltd., in Cause 1036 should be dismissed, and that the libel of the Strathalbyn Steamship Company, Ltd., as bailee of cargo, in Cause 1052, should be dismissed, and that the American-Hawaiian Steamship Company, claimant and cross-libelant in the court below, and appellant here, should recover the full amount of its damages, together with interest thereon and costs of suit, against the Strathalbyn Steamship Company, Ltd., and the stipulator on its bond, and that it should recover the full amount of its costs in Cause 1052 against the Strathalbyn Steamship Company, Ltd., as bailee of cargo, and the stipulator on its bond.

Respectfully submitted,

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